United States Court of Appeals
for the Second Circuit

APPELLEE'S APPENDIX

77-1157

In The

United States Court of Appeals

For the Second Circuit

B

P/s

UNITED STATES OF AMERICA,

Plaintiff Appellee,

— *vs.* —

JAMES R. LORD, JR.; GERHARDT J. SCHWARTZ; GERALD J. YAGY,

Defendants-Appellants.

Appeal From Orders and Judgment of Conviction in the United States District Court for the Western District of New York

APPENDIX

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FBI FORM 302 RELATING TO SCHWARTZ ARREST AND CONFESSION.

FEDERAL BUREAU OF INVESTIGATION

1

Date of transcription 11/26/76

On November 22, 1976, Supervisory Special Agent (SA) EDWARD C. SMITH and Special Agents (SAS) RICHARD K. BERRY, MILTON R. GRAHAM, MICHAEL R. KILGALLON and ROBERT A. MARTINEAU, entered Apartment 3F, 1125 Wyatt Street, Bronx, New York, and placed GERHARDT JULIUS SCHWARTZ under arrest.

SA MARTINEAU independantly advised SCHWARTZ of the official identities of the arresting Agents, of the nature of the charges against him and orally advised SCHWARTZ of his rights as set forth below:

> "You have a right to remain silent".
>
> "Anything you say can be used against you in court".
>
> "You have a right to talk to a lawyer and to have him with you during questioning".
>
> "If you can't afford a lawyer one will be appointed for you".

SCHWARTZ identified himself as GERHARDT SCHWARTZ, Date of Birth (DOB) May 20, 1929, Place of Birth (POB) New York City, New York.

From observation of SCHWARTZ who was clothed in pants, and a T-shirt it was observed that he is white male, approximately five feet ten inches, approximately 180 pounds, with black hair, full beard and mustache graying. Also observed on his right forearm was a tattoo with "Mother and daggers", and a tattoo on his upper left arm "True Love, Mom and Dad".

Interviewed on 11/22/76 at Bronx, New York File # NR 91-17613

by SA ROBERT A. MARTINEAU:mm Date dictated 11/23/76

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FBI FORM 302 RELATING TO SCHWARTZ ARREST AND CONFESSION.

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In response to a question from SA MARTINEAU, asking if there were any guns in the apartment, SCHWARTZ replied and gestured to the hall closet stating that there was a revolver in a briefcase under a plastic bag in the closet.

The above mentioned briefcase was retrieved by SA BERRY.

SCHWARTZ was removed from the aforementioned apartment and transported to the New Rochelle New York Metropolitan Resident Agency by SA MARTINEAU in the compnay of SAS MATTHEW F. DEVINE and DONALD E. DOWD, in a Bureau vehicle.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/24/76

GERHARDT JULIUS SCHWARTZ pointed out a closet, which is next to the front door of Apartment 3F, at 1125 Wyatt Street, Bronx, New York, in which he said was an attache case with a gun in it.

Upon opening the closet a black attache case was observed. The contents of the case are:

1. One Ridgid lock cutter bearing Number E2078;
2. One Smith and Wesson blue steel Model 1054 six shot revolver Number D277946, which was loaded with six .38 shells.
3. One Stanley Wonder Bar;
4. Two pair of hand cuffs with two keys.
5. One black identification case with a card in the name of WALTER MILES with a detective badge;
6. One crome badge marked Special Investigator
7. One pair of sunglasses;
8. One roll of one inch red cross adhesive tape;
9. One white paper envelope containing eight blue capsules with white powder.

Interviewed on 11/22/76 at Bronx, New York File # NR 91-17163

by SA RICHARD K. BERRY:mm Date dictated 11/23/76

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FBI FORM 302 RELATING TO SCHWARTZ ARREST AND CONFESSION.

FEDERAL BUREAU OF INVESTIGATION

1

Date of transcription 11/26/76

GERHARDT JULIUS SCHWARTZ was interviewed at the New Rochelle Resident Agency of the FBI. SCHWARTZ was advised of the official identities of SAS ROBERT A. MARTINEAU, RICHARD K. BERRY, and WILLIAM F. HUTTON, III, by SA BERRY and advised that the interview concerned the bank robbery in Rochester, NY, that SCHWARTZ had been charged with. SA BERRY furnished SCHWARTZ with an "Interrogation: Advice of Rights" form which SCHWARTZ read, stated that he understood and executed the written "Waiver of Rights" contained thereon.

SCHWARTZ provided the following signed statement:

"INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

"Place 1 Sheraton Plaza, N.R. N.Y.
"Date Nov 22, 1976
"Time 10:00 am

"Before we ask you any questions, you must understand your rights.

"You have the right to remain silent.

"Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

"If your cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

"If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering

---

Interviewed on 11/22/76 at New Rochelle, New York File # NR 91-17613

by SAS RICHARD K. BERRY;
WILLIAM F. HUTTON, III and
ROBERT A. MARTINEAU/RAM/rmb Date dictated 11/24/76

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"at any time until you talk to a lawyer.

"WAIVER OF RIGHTS

"I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure of coercion of any kind has been used against me.

"Signed /s/ Gerhardt J. Schwartz

"Witness:

"/s/ Richard K. Berry, SA FBI New Rochelle, NY, 11/22/76
"/s/ Robert A. Martineau, SA, FBI, New Rochelle, N.Y. 11/22/76
"/s/ William F. Hutton III SA FBI New Rochelle N.Y. 11/22/76
Time: 10:04 am

"I, Gerhardt Julius Schwartz, make the following free and voluntary statement to Robert A. Martineau, Richard K. Berry and William F. Hutton, III, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to me.

"During the first week of April, 1976, I entered the Columbia Bank located on Mount Hope Avenue in the Mount Hope Shopping Center in Rochester, New York, and robbed that bank. During the robbery I carried a 12 gauge shotgun loaded with two shotgun shells and was dressed in green overalls, woman's panty hose for a mask and wore gloves. After entering the bank I told everyone to lie down on the floor and then I proceeded to go along to each of the teller's drawers and remove cash and place it in a pillow case. After the robbery I left the bank in an old model Buick and approximately two blocks from the bank switched to a second car. Taken during the above-mentioned robbery was approximately $38,000. I disposed of the shotgun used in the above robbery by throwing it in the Genesee (phonetic) River in Rochester, in the vicinity of Plymouth Avenue.

FBI FORM 302 RELATING TO SCHWARTZ ARREST AND CONFESSION.

"I, Gerhardt Julius Schwartz, make the following free and voluntary statement to Robert A. Martineau, Richard K. Berry and William F. Hutton, III, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to me.

"During 1974 and 1975, I began thinking about doing a bank job to get some money. Around Valentine's Day, 1976, I discussed a bank job with Jimmy Lord, who had been the Night Supervisor at the plant where I had worked. I finally talked Jimmy Lord into doing the bank job. The getaway driver during the bank job, Ronnie Hook, was recommended to us by a guy by the name of "Fast Jerry" who runs a pizza parlor on Dewey Avenue, way out of town in Rochester, New York. "Fast Jerry" did not know what the score was, however, knew that we needed a wheel man. "Fast Jerry" is a white male, Italian, 40 years old, 5'10", 180 pounds, dark hair, large nose, and probably brown eyes. Lord and I met with Hook and took a dry run of the bank. During the first week of April, I believe on a Friday, Lord and I met with Hook in the parking lot of the Plaza where the Columbia Bank is located. Hook, who was the driver, had obtained the getaway car, an older model black Buick, four door, with a dirty dark brown interior. Lord, Hook and I drove to the Columbia Bank and Lord and I went in the bank. I had the 12 guage shotgun which was loaded with two shells under my overcoat. Lord and I entered the bank and I told everyone in the bank to lie down on the floor. Lord went behind the counter through the tellers' door and I went along with him holding the pillow case, and we emptied the drawers together. Lord and I exited the bank and entered the getaway car driven by Hook, with Lord in the front seat and me in the back.

"Lord, Hook and I drove about two blocks from the bank to a point where Lord's car, a blue Nova, was parked. At that point we all switched cars and got into Lord's car and went to the Flagship Hotel in Rochester where I used the name Dennis Lake to register in what I believe was Room 503 or 505. I rented the room just for the getaway and Lord, Hook and I stayed in the room for approximately two hours to

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"split up approximately $38,000 taken during the aforementioned bank robbery. The split of the $38,000 was $14,000 for me, $14,000 for Lord and $10,000 for Hook. We left the hotel, Lord drove me home and we split up. I spent all the money on gambling and women.

"I, Gerhardt Julius Schwartz, make the following free and voluntary statement to Robert A. Martineau, Richard K. Berry and William F. Hutton, III, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to me.

"On the Saturday before the 4th of July, 1976, I held up Wegman's Supermarket in Rochester, New York, using a .38 caliber revolver. During the robbery I wore panty hose over my head a[illegible]old the manager to shut off the alarms and open the sa[illegible] After obtaining the money from the safe, I handcuffed the m[illegible]ger to a pipe in the supermarket and then I left the supermarket and went to an apartment in Rochester and found that I had obtained $39,000 in cash and some checks from the supermarket robbery. I had rented the apartment in my true name at 4725 Lake Avenue, Apartment 3, Rochester, New York.

"I, Gerhardt Julius Schwartz, make the following free and voluntary statement to Robert A. Martineau, Richard K. Berry and William F. Hutton, III, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to me.

"On the Saturday before the 4th of July, 1976, I held up Wegman's Supermarket in Rochester, New York, with "Fast Jerry", a white male, Italian, 40 years, 5'10", 180 pounds, large nose, dark hair, probably brown eyes, who owns a pizza parlor way out on Dewey Avenue in Rochester, New York. "Fast Jerry" had set up the supermarket robbery with the supermarket manager, who was a white male, 5'11", 165 pounds, medium build, light colord hair, in his early 20's, who drives a funny little white car. During the above robbery, Jerry obtained a dirty looking car, which I believe was gold in color, and I carried a .38 caliber revolver. We entered the supermarket wearing panty hose over our heads for a mask and I told the kid who was the manager to shut off the alarms and open the safe for me. After we got all the cash out

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of the safe, I handcuffed the supermarket manager to a pipe and "Fast Jerry" and I drove to an apartment I had rented in my name at 4725 Lake Avenue, Apartment 3, in Rochester, New York. "Fast Jerry" and I got $13,000 each and the manager of the supermarket got $13,000 from the robbery, for a total of approximately $39,000.

"I, Gerhardt Julius Schwartz, make the following free and voluntary statement to Robert A. Martineau, Richard K. Berry and William F. Hutton, III, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to me.

In July, 1976, I had heard that Ronnie Hook had been threatening to expose a lot of people to the police in connection with the robbery of the Columbia Bank in the Mount Hope Shopping Center, Rochester, New York, during the first week of April, 1976, and the robbery of Wegman's Supermarket in early July of 1976. On the night of July 16, 1976, Hook and I met in a little coffee shop on Dewey Avenue where Hook believed he was going to get $2,000 in order to keep his mouth shut. Hook and I drove out into a desolate area, way out past Ridge Road, in an area called Greece, New York. When I got out there with Hook, I took an ice pick that was in the car and stabbed him in the right side and then kept repeatedly stabbing him with the ice pick. We eventually fought our way out of the car where I left Hook to die by the side of the road. As I drove back towards town, I threw the ice pick out the window, somewhere along the road.

"I, Gerhardt Julius Schwartz, make the following free and voluntary statement to Rovert A. Martineau, Richard K. Berry and William F. Hutton, III, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to me.

"In July, 1976, I had been hanging around the 44 Club located at 44 Lake Avenue in Rochester, New York, when I had heard that Ronnie Hook had told "Fast Jerry", a white male, Italian, 40 years, 5'10", 180 pounds, big nose,

FBI FORM 302 RELATING TO SCHWARTZ ARREST AND CONFESSION.

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dark hair, probably brown eyes, who owns a pizza parlor way out on Dewey Avenue in Rochester, New York, that he would bring the police right to his door about the Columbia Bank job, the Wegman's Supermarket robbery and bury a lot of people of he did not get any money from "Fast Jerry". "Fast Jerry" gave Ronnie Hook $1,500, however, Hook quickly blew the money and came back to "Fast Jerry" for another $2,000. "Fast Jerry" got scared and went to hide out somewhere. Jimmy Lord and I heard about Ronnie Hook's demand for $2,000 and Jimmy Lord found out where Ronnie Hook was, got in touch with him and told him to meet with us and he could have the $2,000. Jimmy Lord and I met with Ronnie Hook on the night of July 16, 1976, at a coffee shop on Dewey Avenue, not far from the pizza parlor owned by "Fast Jerry". We took Ronnie Hook for a ride in Jimmy Lord's car to a desolate spot way out past Ridge Road, in an area called Greece, New York. An ice pick was on the dashboard of the car, and when we stopped I stabbed Ronnie Hook in the right side and then repeatedly stabbed him. Jimmy Lord and I rustled Hook out of the car and Lod held Hook while I stabbed him with the ice pick. I believed Hook was dead, however, Jimmy Lord did not think so, so I held Hook while Lord repeatedly stabbed Hook with the ice pick. Lord and I left Hook by the side of the road and we drove back towards town. While driving into town, I threw the ice pick out the window.

"I, Gerhardt, Julius Schwartz, have read the above statement consisting of this page and four other pages and now sign it because it is true. I have initialed any corrections that were necessary. I have also initialed and dated each of the four previous pages.

"/s/ Gerhardt J. Schwartz

"Witness:

"/s/ Robert A. Martineau, Special Agent, FBI, New Rochelle, 11/22/76
"/s/ William F. Hutton, III, Special Agent, FBI, New Rochelle, NY 11/22/76
"/s/ Richard K. Berry, Special Agent, FBI, New Rochelle 11/22/76".

FBI FORM 302 RELATING TO SCHWARTZ ARREST AND CONFESSION.

In addition to the above statement, SCHWARTZ provided the following information:

SCHWARTZ stated that he believed that GERALD JOSEPH YAGY arrested by the FBI in Rochester, in connection with Columbia Bank robbery is the same "Fast Jerry" described in the above signed statement.

Additionally, SCHWARTZ stated that the clothing, that is, the dark green one piece coveralls, and panty hose stocking masks worn by he and LORD during the robbery of the Columbia Banking Savings and Loan Association, 1415 Mt. Hope Avenue, Rochester, NY, on April 9, 1976, were purchased at a Sears Store in Rochester, a couple of days before the robbery. SCHWARTZ stated he did not recall exactly where the gloves for the robbery were purchased but they could have been bought at any five and dime store.

SCHWARTZ stated that in order to understand why RONNIE HOOK had been stabbed it was necessary to know about the Wegman's Supermarket holdup and the Columbia bank robbery, to understand the motive for trying to kill HOOK.

SCHWARTZ stated that he left the Rochester, NY, area in July, 1976, the specific day could not be recalled, however, SCHWARTZ stated it was the Monday morning after the Saturday when JIMMY LORD had been arrested for the bank robbery. SCHWARTZ stated he flew to NY and has been in the NY area ever since.

SCHWARTZ stated he first went to the Yonkers, NY, area, where he stayed with various people and at various motels.

SCHWARTZ provided the following chronological list of places he stayed at as accurately as he could recall:

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KENNEY Last Name Unknown (LNU)
YO 8-3002
82 Gavin Street
Yonkers, NY
(Met KENNEY at a Disco on Yonkers Avenue)

MARIO RIDI (phonetic)
Apartment 3A
82 Gavin Street
Yonkers, NY
(Stayed with RIDI for two weeks, while RIDI's
wife was in Europe).

Stayed with KENNEY LNU again for two week period.

Yonkers Motor Inn
Yonkers Avenue
Yonkers, NY

SCHWARTZ stated that he stayed at the Motor Inn for a week or two under the name of WALTER MILES. SCHWARTZ stated that he had been taken to the Yonkers Motor Inn by BILLY LNU, telephone number 914-237-5882, who he had met at the Embers Club in Yonkers.

SCHWARTZ stated that he copied the license number of a black Cadillac parked out in front of the Yonkers Motor Inn on the motel registration card. SCHWARTZ stated that he did not know RONALD "BUTCH" FUTIA nor had JOEL ASH been with him at the time he registered at the Motor Inn.

A Photograph of RONALD "BUTCH" FUTIA was displayed to SCHWARTZ. SCHWARTZ stated that the photograph reminded him of a person he may have seen at Yonkers Race Track.

A photograph of JOEL ASCH was displayed to SCHWARTZ. SCHWARTZ stated that knows ASCH or CRAZY JOE; however, did not know where ASCH lives or how to reach him. SCHWARTZ stated that he first met ASH at the Dunwitty Motor Inn.

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Trade Winds Motel
Yonkers Avenue
Yonkers, NY

SCHWARTZ stated that while staying at the Trade Winds he met a guy in a small luncheonette on Yonkers Avenue at Bronx River Road who sold him the Smith and Wesson revolver which was in the briefcase and taken during his arrest on November 22, 1976. SCHWARTZ stated that he had met the guy while playing the pinball machine at the luncheonette and asked if he knew where he could get a gun. SCHWARTZ stated a week later he bought the gun from the guy for $100.00.

SCHWARTZ stated that after leaving the Trade Winds he stayed with varius girls he met at the Embers Club in Yonkers and the Bronx, NY.

SCHWARTZ advised he met LIZ RIVERA a couple of weeks ago and has been staying with her at Apartment 3F, 1125 Wyatt Street, Bronx, NY. SCHWARTZ stated that RIVERA did not know anything about his true identity or wanted status.

The following description of SCHWARTZ was obtained from observation and interview:

Name	GERHARDT JULIUS SCHWARTZ
Aliases	Jerry Schwartz, Walter Miles, Dennis Lake, Blackey, Blackie
Race	White
Sex	Male
Date of birth	May 20, 1929
Place of birth	NY, NY
Height	Five feet 10 inches
Weight	180 pounds
Build	Heavy
Hair	Black, medium length; greying
Facial hair	Full beard and mustache; black and greying

FBI FORM 302 RELATING TO SCHWARTZ ARREST AND CONFESSION.

Scars and marks	Tattoo, right forearm, heart with mother and daggers; left upper arm with True Love Mom and Dad
Social Security Account Number (SSAN)	073-22-1994
Address	293 Brooks Avenue Rochester, NY
Wife	LINDA ANN SCHWARTZ same address
Father-in-law	KAYWOOD CLARKE same address
Occupation	Spray Painter
Former Employment	Taylor Instrument 95 Aimes Street Rochester, NY
Education	2nd Term Junior High School 188 New York City, NY
Literacy	Read and write English language
Prior arrests	Numerous arrests admitted in New York State.

FBI ARREST AND INTERVIEW LOG OF GERHARDT SCHWARTZ, 11-22-76.

Arrest AND Interview Log of Gerhardt Julius Schwartz, 11/22/76.

8:35 A.M. Schwartz arrested in Apt 3F, 1125 WYATT Street, Bronx, New York by Supv. SA Edward C. Smith and SAs Richard Berry, Michael Kiljallon, Milton Graham and Robert A. Martineau.

8:40 A.M. Schwartz advised by SA MARTINEAU of charges against him, official identities of SAs of FBI and orally advised of below rights:

"You have a right to remain silent." "Anything you say can be used against you in Court." "You have a right to talk to a lawer for advice and to have him with you during questioning." "If you can't afford a lawyer one will be appointed for you."

8:47 a.m., SA Devine arrived in apartment 3F and with SA Graham

FBI ARREST AND INTERVIEW LOG OF GERHARDT SCHWARTZ, 11-22-76.

②

Conducted a search of Schwartz.

8:49 a.m. Schwartz questioned by SA MARTINEAU about weapons and Schwartz indicated a revolver was in the closet.

8:53 a.m. Schwartz given a cigarette by SA Devine.

9:05 a.m., Schwartz was given a coat to put on

9:10 am. Schwartz was placed in a BUCAR and transported to the NR MRA by SAs MARTINEAU, DEVINE and SA DON DOWD.

9:17 a.m. SCHWARTZ furnished with a cigarette by SA Martineau.

9:30 a.m. Arrive NR MRA

9:40 a.m. Schwartz photographed by SAs Caplinger, MARTINEAU and Devine.

9:53 a.m. SA Devine furnished Schwartz with a cigarette

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FBI ARREST AND INTERVIEW LOG OF GERHARDT SCHWARTZ, 11-22-76.

Log Re. Schwartz ③

9:55 a.m., Photography ended.

9:55 a.m. Schwartz placed in interview room and strip search conducted by SAs Berry and Hutton while SA Martineau left room to attend to Administrative Matters.

10:00 a.m. SA Martineau returned to interview room as SA BERRY furnished Schwartz with FD-395

10:04 a.m. Schwartz signed waiver on FD-395 & witnessed by SAs Martineau Hutton & Berry.

10:10 a.m. Schwartz fingerprinted by SA MARTINEAU

10:25 a.m. SA HUTTON furnished Schwartz with Coffee. Schwartz furnished cigarettes and allowed to smoke at will.

FBI ARREST AND INTERVIEW LOG OF GERHARDT SCHWARTZ, 11-22-76.

④

10:30 a.m. Interview began
11:00 a.m. Schwartz placed
telephone call from interview
room t his wife + family
at Tel # (717) 328-7568
11:27 a.m phone call ended
11:28 a.m. Interview resumed.
11:40 a.m. Schwartz began
Oral Statement
11:55 a.m. Schwartz furnished
milk Shake and Hamburg
from McDONALDS
12:30 p.m Oral statement
ended and SA Martineau
left room to have typed
statement prepared by
a Bureau stenographer.
1:30 p.m. Statement completed
and furnished to Schwartz
by SA Martineau & read
1:45 p.m Schwartz signed Statement
2:00 p.m. Depart NR MRA

FBI ARREST AND INTERVIEW LOG OF GERHARDT SCHWARTZ, 11-22-76.

Log RE: Schwartz ⑥

via Bucar with SAs MARTINEAU, Hutton & MARTINEZ having custody of Schwartz with SAs Berry and Kilgallon in trail car.

2:35 p.m. Arrive NYO of the FBI for photographs in view of malfunction of Camera at NR MRA in morning

2:39 p.m. Schwartz photographed at NYO by Clerk and SAs Berry MARTINEAU & Hutton.

2:50 p.m. Depart NYO via Bucar enroute S.D. N.Y. with Schwartz in custody of SAs Martineau HUTTON & Martinez with SAs BERRY & Kilgallon in trail CAR.

3:07 pm Arrive USA's office SDNY

FBI ARREST AND INTERVIEW LOG OF GERHARDT SCHWARTZ, 11-22-76.

⑥

3:11 p.m. At Room 639, S.D. N.Y, AUSA Schatten & SA MARTINEAU prepared Affidavit (AUSA STEVEN A. Schatten)

3:35 p.m. AUSA Schatten interviewed Schwartz after advising him of his "Rights".

4:00 p.m. AUSA Schatten interview terminated.

4:03 p.m. Schwartz transported to U.S. Magistrates Courtroom 115, SDNY

4:05 p.m. Ms. Aponte (phonetic) interviewed Schwartz at Magistrate's Courtroom # 115, SDNY.

4:25 p.m. Public Defender TOM Concannon (phonetic) interviewed Schwartz in Magistrates Courtroom.

4:37 p.m. Arraignment of

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FBI ARREST AND INTERVIEW LOG OF GERHARDT SCHWARTZ, 11-22-76.

LOG RE Schwartz ⑦

Schwartz before U.S. Magistrate LEONARD Bernikow, S.D. N.Y.

4:47 p.m arraignment ended.

4:55 p.m. Deputy U.S. Marshal Lopez took custody of Schwartz.

Robert A. Martineau SA, FBI, 11/22/76

William F [illegible] SA, FBI, 11/22/76

David C. Martinez SA, FBI, 11/22/76

Donald E. Dowd, SA, FBI 11/22/76

Edward C Smith SA, FBI, 11/22/76

Matthew F Devine SA, FBI 11/22/76

Milton R. Graham, S.A., F.B.I. 11/22/76

Richard [illegible] SA FBI 11/22/76

Michael [illegible] SA FBI 11/22/76

DEFENDANT YAGY'S MOTION FOR SEVERANCE AND DISCOVERY.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

Plaintiff

VS.

JAMES R. LORD, JR., GERHARDT J. SCHWARTZ, GERALD J. YAGY,

Defendants

NOTICE OF MOTION ON BEHALF OF DEFENDANT YAGY

Indictment No. 76/131

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Roy E. Colicchio, one of the attorneys for Gerald J. Yagy, sworn to the 21st day of January, 1977, and upon the indictment and all of the papers and proceedings heretofore had herein, said defendant will move this Court, at the U.S. Courthouse, Rochester, New York on the 14th day of February, 1977, at 10:00 a.m. in the forenoon for an order directing a severance of defendant Yagy's trial under indictment 76/131 from the trials of defendants Lord and Schwartz; for a production of all statements given by defendants Lord and Schwartz to any Federal agent, or any other police enforcement agency of any State or to the District Attorney or U.S. Attorney of any State or Federal Government or any other person, implicating, directly or indirectly, defendant Yagy with respect to the subject matters under indictment 76/131 and for purposes of determining what effect it would have to delete or redact any reference to defendant Yagy from any of said statement or statements upon a juror hearing the

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trial of the above-entitled action, and for such other and further relief as to the Court may seem just and proper under the circumstances of this case.

Dated: Rochester, New York
January 21, 1977

Yours, etc.

ROY E. COLICCHIO, ESQ.
Attorney for Def. Gerald J. Yagy
Office & P.O. Address
44 Exchange Street
Rochester, New York 14614
(716) 325-5494

TO: DISTRICT COURT CLERK
U.S. Courthouse
Buffalo, New York 14202

HON. JOHN T. ELFVIN
District Court Judge Chambers
U.S. Courthouse
Buffalo, New York 14202

GERALD J. HOULIHAN, ESQ.
Assistant U.S. Attorney
U.S. Courthouse
Federal Building
Rochester, New York 14614

DEFENDANT YAGY'S MOTION FOR SEVERANCE AND DISCOVERY.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs. Plaintiff

JAMES R. LORD, JR., GERHARDT J.
SCHWARTZ, GERALD J. YAGY,

Defendants

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

ROY E. COLICCHIO, being duly sworn, deposes and states that:

1) Deponent is an attorney duly licensed to practice his profession in the State of New York; that he is a member of the law firm of Cucci, Welch, Colicchio & Weinstein with offices at 44 Exchange Street, Rochester, New York, and that deponent has been admitted to practice before the Supreme Court of the State of New York and before the U.S. District Court, Western District of New York and the U.S. Supreme Court.

2) That during the May 1976 session of the Federal Grand Jury, indictment #76/131 was returned against the above-named defendants, including Gerald Yagy, which indictment, upon information and belief, was filed on November 29, 1976. Pursuant to said indictment, defendant Yagy was indicted for allegedly violating U.S.C. Sections 2113 (a) and (d) and 371.

3) Upon information and belief, defendants James R. Lord, Jr. and Gerhardt J. Schwartz were also indicted, apprehended

and presently in police custody and are co-defendants along with defendant Yagy under the same indictment.

4) Upon information and belief, defendant Schwartz has given numerous statements to various police agencies including, but not limited to, the Federal Bureau of Investigation and other agents of the Federal Government regarding various matters which are the subject matters of indictment 76/131, which statements, upon information and belief, implicate defendant Yagy in one fashion or another.

5) Upon information and belief, defendant Lord has or is in the process of giving statements to agents of the Federal Government and/or of the police of the City of Rochester or the Sheriff of the County of Monroe regarding various matters which said defendant is under indictment both in Federal and in State Courts, and that the said statement or statements implicate in one way or another defendant Yagy with respect to the subject matters of indictment 76/131.

6) Upon information and belief, the statements given by Schwartz or Lord or both of them are, upon information and belief, incriminating statements which implicate the defendant Yagy by name directly or indirectly, or by implication, or by implication make it impossible for the jury to come to any other conclusion that defendant Yagy was, in some fashion, involved in the matters which are referred to under indictment #76/131.

7) Defendant [illegible] ~~Yagy~~ made in those statements or confessions regarding crimes alleged under indictment #76/131 either with respect to himself or which relate to either one or both of the remaining co-defendants under said indictment.

8) Deponent takes the position that defendant Yagy's trial should be severed from the trials of defendants Lord and Schwartz on the grounds that any statements given by defendants Lord and/or Schwartz cannot be used against co-defendant Yagy and, any attempt to eliminate or delete or redact portions of statements given by defendants Lord or Schwartz would be improper since it would allow the jury to speculate as to who was the missing defendant, especially where, upon information and belief, the extent of proof involving Yagy, at best, is testimony given by one Ronald Hooks, an alleged accomplice and an unindicted co-conspirator. U.S. Bozza 365F2d 206 (C.A. 2d, 1966); Bruton vs. U.S., 391 US 123 (1968); U.S. Ex rel LaDelle vs. Mancusi, 404 F 2d 690 (C.A. 2d 1968); U.S. vs. Greenwall, 336 F 2d 960 (C.A.D.C. 1964); U.S. vs. Truslaw, 530 F 2d 257 (C.A. 4th 1975).

9) The risk in a joint trial runs to the fact that defendants Lord or Schwartz may not take the stand that the Government will attempt to delete or redact portions of their statements as the same relate to defendant Yagy or inadvertently all admissions into evidence the statements containing reference to defendant Yagy. The Court will attempt to instruct the jury to disregard

whatever references to defendant Yagy or instruct the jury not to attempt to fill in the blanks where Yagy's name has been deleted as the end result of one or more jurors unable to resist the temptation to fill in the blank and thus indirectly implicating Yagy as the missing party in the statement. Defendant Yagy is thus deprived of his rights of cross-examination and under the sixth amendment and such other constitutional rights that he may have accordingly.

10) In addition, to the foregoing, and according to the information furnished deponent by the U.S. Attorneys Office, both defendants Lord and Schwartz have extensive criminal and felony records; that defendant Lord, at the time of the alleged bank robbery, was already on parole or probation for a prior bank robbery, and in addition, that defendant Schwartz did in fact flee the Rochester, New York area in about July 1976 and he was not apprehended until the latter part of December, 1976 or early part of January 1977; that the cumulative effect of all this factual information being presented to the jury or the potentiality of it being presented to the jury will be prejudicial to defendant Yagy and regardless of the extent of Jury instructions, if one runs a high risk that the jury will associate some probative value of guilt as a result of actions of co-defendants through defendant Yagy and that said instructions will be inadequate, from a practical point of view to protect the rights of defendant Yagy.

DEFENDANT YAGY'S MOTION FOR SEVERANCE AND DISCOVERY.

11) Deponent respectfully requests on behalf of defendant Yagy that the trial of Gerald J. Yagy be severed from the trial of defendant [illegible] and Schwartz; that the Government be directed to produ [illegible] s of all statements given by defendants Lord and Schwartz t [illegible] eral agents or to police enforcement agencies of any municipal government or to the Monroe County District Attorneys Office or any other office of the District Attorney, Federal or State, so that it may be determined what statements were given by Lord and Schwartz and to what extent the same implicate, directly or indirectly defendant Yagy and to what extent, if any, deletion of defendant Yagy's name therefrom will effect the ability of a juror to imply defendant Yagy within the terms and effect of said statement or statements, and for such other and further relief as to the Court may seem just and proper.

ROY B. COLICCHIO

Sworn to before me this
21st day of January, 1977.

Celinda L. Mack
CELINDA L. MACK
COMMISSIONER OF DEEDS
CITY OF ROCHESTER, N. Y.
My Commission Expires Aug. 18, 1977

DEFENDANT LORD'S MOTION FOR DISCOVERY AND SEVERANCE.

IN THE

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

JAMES R. LORD, JR.,
GERHARDT J. SCHWARTZ, and
GERALD J. YAGY,

Defendants.

NOTICE OF MOTION

Cr. 76-131

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ALFRED P. KREMER, the undersigned will move this court, on behalf of James R. Lord, Jr., at a motion term to be held at the United States Courthouse, State Street, Rochester, New York, on December 13, 1976, at 10:00 A. M., or soon thereafter as counsel can be heard for the following relief:

1. An order for discovery in accordance with the motion previously made October 31, 1976 and returnable September 13, 1976.

2. An order severing defendant, James R. Lord, Jr., in this case from that of his co-defendants pursuant to Rule 8 and Rule 14 F.R.C.P.

DEFENDANT LORD'S MOTION FOR DISCOVERY AND SEVERANCE.

Yours, etc.,

ALFRED P. KREMER
Attorney for Defendant
Office and Post Office Address
200 Times Square Building
Rochester, New York 14614
Telephone: 546-6040

TO: RICHARD J. ARCARA
United States Attorney
GERALD J. HOULIHAN, ESQ.
Assistant United States Attorney
of counsel
United States Courthouse
Federal Building
State Street
Rochester, New York 14614

DEFENDANT LORD'S MOTION FOR DISCOVERY AND SEVERANCE.

IN THE

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

JAMES R. LORD., JR.,
GERHARDT J. SCHWARTZ, and
GERALD J. YAGY,

Defendants.

AFFIDAVIT

Cr. 76-131

ALFRED P. KREMER, being duly sworn, deposes and says:

1. He is the defendant James R. Lord, Jr.'s attorney.

2. In accordance with motion papers filed in this court, the defendant previously moved for certain pre-trial discovery, and a bill of particulars. Although the United States Attorney has graciously consented to expedite discovery by making most of these items available, it is respectfully submitted there has been no discovery order made by the court and there has been no discovery

motions argued.

3. Until discovery takes place, your deponent will not be adequately prepared to advocate defendant's case and will be unprepared to pick a jury as many of the items of defendant's defense cannot be worked out until the discovery is completed.

4. With respect to defendant's request for severance pursuant to Rules 8 and 12, your deponent submits the following:

A. Defendants, Schwartz and Yagy have made full confessions of their complicity in the bank robbery. Each of those statements implicates defendant, Lord.

B. Your deponent has been advised that with respect to defendant's, Schwartz, statement, that it has been redacted so that it has deleted the name of defendant, Lord, from the descriptive portions and has instead substituted the word "another".

C. It is respectfully submitted that this is insufficient redaction in that the jury will see three (3) defendants seated at counsel table. Upon hearing the word "another," the jury will have to conclude that that other person is either defendant Yagy or defendant Lord.

D. It is respectfully submitted that defendant, Lord, is being denied his right to confrontation in accordance with Bruton v. United States, 391 U.S. 123 (1968), as there will no doubt be an attack upon the statements made by those defendants or there will be an attempt by defense counsel to implicate defendant, Lord, by association.

E. There is no way that defendant, Lord, can cross-examine a piece of paper and the redaction effort cannot hope to be successful. Defendant Lord's defense will be hopelessly prejudiced by the presence of these statements.

F. Your deponent believes that the defendant, Lord, cannot be placed inside of the bank by any witness, including the co-conspirator Hook. Based upon this, it cannot be said that the statements of the confessing co-defendants would be cumulative or would duplicate evidence that was already introduced to trial. Thus, the evidence of the "redacted" statements would be devastating, crucial and would be the only evidence which would link the defendant with the crime committed. The prejudice to defendant will be severe.

G. Further, the nature of the proof is such that it is inflammatory, prejudicial and will cause a jury to have a great deal of sympathy for the victims. There will be three (3) bank tellers who will testify as to their fear, horror, and shock as the bank robbery began. The jury's sympathy will be directed towards the victims to a higher degree than if a white-collar crime had been committed. No instruction by any judge will be sufficient to overcome the natural tendency of jury to want to "get" the perpetrators of this deed. Co-conspirator Hook will, no doubt, attempt to testify as to the horror that he felt on each of the forty-odd times that one of the co-defendants plunged a knife in his body as the result of an argument occurring after the robbery. Based upon all of that, no jury will obey a court's instruction to apply the redacted confession as against the person uttering it and as against no other person.

H. Indeed, the efforts to redact the confession and take out the name of Lord and place in the words "some other person" will highlight the missing name even more and draw the jury irresistibly to the conclusion that"some other person" and the person seated at the counsel table, James R. Lord, Jr., are one and the same.

s/ Alfred P Kremer
Alfred P. Kremer

Sworn to before me this
9th day of December, 1976.

s/ DONNA C. BROWN
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1978

DEFENDANT SCHWARTZ'S REQUEST FOR A SHOW CAUSE ORDER RE: RULE 20 AND HIS CONFESSION.

IN THE DISTRICT COURT OF THE UNITED STATES

for the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

JAMES R. LORD, JR.
GERHARDT J. SCHWARTZ
GERALD J. YACY

May 1976 Session
No. 76-131
Vio. T. 18, U.S.C.
§§2113(a), 2113(d) and 371.

ORDER TO SHOW CAUSE

Upon reading and filing the Affidavit of Gerhardt J. Schwartz, sworn to the 26th day of January, 1977, and upon all proceeding heretofor had herein, and it being determined that there are valid grounds for the issuance of this of this Order to Show Cause; it is,

ORDERED, that Richard J. Arcara, Esq., United States attorney, or his representative show cause before a Trial Term of this Court to be held on the Eighth day of February, 1977, at 9 o'clock in the forenoo thereof or as soon thereafter as counsel can be heard at United States Courthouse, Exchange Street, Rochester, New York, why an order should no issue excluding the purported confession of Gerhardt J. Schwartz from th case of the United States of America vs Lord, et. al., and further prov that said purported confession be and hereby is declared null and void a matter of law and for such other and further relief as may be just or premises. And it is further

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DEFENDANT SCHWARTZ'S REQUEST FOR A SHOW CAUSE ORDER RE: RULE 20 AND HIS CONFESSION.

ORDERED, that service of a copy of this Order to Show Cause and the Affidavit upon which it is based made upon the Office of the United States attorney in Rochester, New York or Buffalo, New York on or before the day of January, 1977, shall be deemed sufficient.

Enter:

John Elfvin
United States District Judge

DEFENDANT SCHWARTZ'S REQUEST FOR A SHOW CAUSE ORDER RE: RULE 20 AND HIS CONFESSION.

IN THE DISTRICT COURT OF THE UNITED STATES

for the Western District of New York

THE UNITED STATES OF AMERICA	May 1976 Session
	No. 76-131
-vs-	Vio. T. 18, U.S.C.
	§§2113(a), 2113(d) and 371.
JAMES R. LORD, JR.	
GERHARDT J. SCHWARTZ	**AFFIDAVIT**
GERALD J. YAGY	

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

GERHARDT J. SCHWARTZ, being duly sworn, says:

1. That Deponent is one of the above-named Defendants, stands accused of the commission of violations of Title 18, USC, Sections 2113 A and D, and Section 371, and is presently in custody of the Monroe County Sheriff at Monroe County Jail, Rochester, New York.

2. That Merwin Morehouse, Esq., assigned attorney for your Deponent, applied in behalf of your Deponent in United States District Court, Rochester, New York, on the 25th day of January, 1977, participated in a conference with United States District Judge and counsel for co-defendants when all parties agreed that the trial of the above accusation be commenced on the eighth day of February, 1977, at 9 o'clock in the forenoon.

3. That Deponent contends and always has contended that a purported confession of your Deponent transcribed the 26th day of November, 1976, and purportedly taken the 22nd day of November, 1976, in New Rochelle, New York, in the presence of three (3) special FBI agents is null and void as a matter of law under the facts and circumstances and requests a hearing be held upon the merits prior to the trial of the above-entitled action. Deponents respectfully submits in support of this motion that all necessary

3. (continued)

personnel will be available on said morning and the hearing will not be a time consuming procedure.

4. Your Deponent complains and affirmatively avers that said transcript of the proceeding held the 22nd day of November, 1976, as aforesaid is not a complete transcript of the events that took place and that the purported statement of your Deponent is not accurate.

5. Deponent further submits that prior to the interview as set forth in said transcript Deponent discussed completely and thoroughly with said special agents the applicability of Rule 20 of the Rules of Federal Criminal Procedure; that Deponent agreed to make a statement based upon the promise of the special agents; more particularly, an agent whose name is unknown to your Deponent but whom your Deponent recalls to have been a slender person with a slender face.

6. That said agent unequivocally promised Depinent that if the statement were made by your Deponent and a waiver executed and a acknowledgement of Miranda warnings, Deponent would unequivocally and unconditionally have the above-entitled proceeding transferred by the United States attorney to the Southern District of the State of New York, Federal Court, and that all subsequent proceedings herein would be conducted in said latter court.

7. That your Deponent relied upon said promises and did make a statement to the said agents.

8. Deponent further submits that at the middle of Page Three thereof "fast Jerry" was implicated in the purported bank robbery. Deponent denies ever having implicated the said "fast Jerry" and never having made said statement.

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9. Deponent further denies the accuracy of other purported statements in said confession.

WHEREFORE, Deponent respectfully requests this Order to Show Cause issue requiring United States attorney Richard J. Arcara or his representative to show cause prior to the trial date set by the United States District Court on the eighth day of February, 1977, at United States District Court, Rochester, New York, why an Order should not issue declaring under said facts and circumstances the purported statements to be null and void as a matter of law and inadmissible in the trial of the above cause and excluded from the case of the United States of America and for such other and further relief as might be just and proper.

Sworn to before me
this 26 day of January
1977
M. Morehouse
Comm Deeds

s/ Gerhart Schwartz

MERWIN MOREHOUSE
Attorney for Defendant
Office and Post Office Address
1013 Union Trust Building
19 West Main Street
Rochester, New York 14614

EXCERPTS OF VOIR DIRE QUESTIONING, dated 2-8-77.

JUROR #10: Are you talking about the Columbia Bank in Rochester? I have a savings account in one in Geneseo.

MR. HOULIHAN: It is the Columbia Bank?

JUROR #10: Yes.

MR. HOULIHAN: Would the fact that this involved the Columbia Bank, would that affect your judgment in any way?

JUROR #10: No.

MR. HOULIHAN: You would listen to the evidence and judge it fairly and impartially?

JUROR #10: Yes.

MR. HOULIHAN: Now, the date of the bank robbery in this case is April 9, 1976, and there was some publicity surrounding the bank robbery, and do any of you remember reading anything about this bank robbery?

JUROR #1: I read -- I heard something on TV.

MR. HOULIHAN: You heard something on TV?

JUROR #1: I don't know what it was.

MR. HOULIHAN: Well, you don't remember what you heard?

JUROR #1: No.

MR. HOULIHAN: Obviously it wouldn't affect anything that you would do in this case?

JUROR #1: Correct.

MR. HOULIHAN: One of the Government witnesses in this case is a young man named Ronald Hook, and there was some publicity concerning Mr. Hook at one time as to the fact that he was stabbed some forty five times --

MR. KREMER: May I approach the bench?

MR. MOREHOUSE: I object to this.

MR. KREMER: May I approach the bench?

(Thereupon the following conference ensued at the bench:

MR. KREMER: Your Honor, at this time I am going to move for a mistrial based on the fact that the Government has introduced a prejudicial comment with respect to Mr. Hook that no amount of instruction by this Court can possible cure. There is no way that is part of the case at this particular time, other than Mr. Houlihan's allegation that this is part of some conspiratorial act. It is premature at this particular time, and by talking about the "stabbing," it creates additional inference of guilt which my client, Mr. Lord, can never overcome. I would ask for a mistrial at this time.

MR. COLICCHIO: This is specifically what we tried to avoid, tried to avoid on our prior motion before your Honor. It is my recollection that, if and when the Government establishes a continuing conspiracy as to hookup any -- connect up any attempted homicide or stabbing of Mr. Hook, at that point a ruling would have to be made in regard to evidence coming in about the attempted homicide or stabbing. Now, to come in and say, 'Did you read an article as to a Government witness having been stabbed,' and not having said anything else, and if they don't go into a continuing conspiracy in the course of the trial, that statement now is embedded in the juror's minds that this witness was stabbed, whether it is sympathy for or otherwise, it is there, and trying to explain away that you are not supposed to recognize the fact that a man may have been stabbed is almost an impossible thing to do. These people are human, they will take everything into consideration. Based on that, in addition to what Mr. Kremer stated, the defendant Yagy also joins in the motion for a mistrial.

MR. MOREHOUSE: As does the co-defendant Schwartz.

MR. HOULIHAN: If I may be heard? For the record, the question was asked without any relationship to the defendants in this case. It was carefully phrased so as to not give any indication that any of these defendants had anything to do with that attempted homicide. The reason for the question obviously is that that received a great deal of publicity, if they read about the stabbing, formed any opinion about it as a result of the stabbing, whether it had anything to do with the case or not. I think it is pertinent inquiry during the voir dire.

THE COURT: All right. It surprised me to have the matter come up because I thought after our sidebar conference it wasn't coming up. I think, Mr. Houlihan, however, if you had stated at the sidebar what you have now stated, and your intention to bring it up in this fashion, that I would not have been surprised, and I would have said — I would have allowed it. I see no reason to depart from that now. It is just that no judge likes surprises. Please fill me in after this. Now, beyond that, and even if there be some implication there is some connection with one or more defendants with this stabbing, I've got to leave that, I think, with Mr. Houlihan. He knows that if he doesn't carry the day, he knows that if he doesn't carry the day as far as proving the conspiracy and the duration of the conspiracy and the purpose of the conspiracy so as to make admissible this testimony, he knows there is going to be a mistrial. I mean I wouldn't say this would be a mistrial off what you have said now, but if I feel this is tied in with the defendants so the jurors get the idea it is tied in with the defendants and you don't prove the conspiracy to the point where this is admissible, then, of course, there will be a mistrial. You take that risk, and I leave it to your competency and your proof. The motions for a mistrial are denied.

MR. HOULIHAN: I misunderstood your direction at the bench conference. I thought you had indicated that if the matter were to come up it would be a proper basis, I apologize to the Court.

THE COURT: What I said there, the way I thought we left it, the name of Ronald Hock would be presented to the prospective jurors as a prospective witness, they would be asked whether or not they knew anything about him, without any of these overtones of perforations.

MR. KREMER: Is it my understanding, your Honor, that Mr. Houlihan will be precluded from further questioning on voir dire with respect to this particular --

THE COURT: No, he can go as far as he has already. He knows if he gets to the point where there is -- where I feel that the jurors are going to infer that there is involvement in this by one or more of the defendants, and he thereafter does not prove in the case the conspiracy to the point where this work is admissible as evidence comes in as evidence, then he is going to suffer a mistrial.

MR. COLICCHIO: Can we have an instruction that the question is asked solely for the purpose of knowing whether they have heard of the man, Ronald Hook?

THE COURT: I think that is all he said. The sole purpose -- I think it is actually all that he said -- that is the sole purpose.

MR. COLICCHIO: We take exception.

THE COURT: All right.

MR. KREMER: Exception.

MR. MOREHOUSE: Exception.

THE COURT: All right.

(Thereupon the conference at the bench was terminated.)

MR. HOULIHAN: Thank you, your Honor. Ladies and gentlemen, you have heard my question, and I wonder if that recalls to mind to any of you any publicity concerning this particular case? Mr. Cantanese?

JUROR #4: I think the comment you made does — I do recall the case now about this fellow by the name of Hook. I think he was stabbed because he didn't get his share of the money.

MR. KREMER: Excuse me. Your Honor, I would renew my special request which I made previously, and I would like to approach the bench?

THE COURT: No, I have it in mind. I will deny it.

MR. KREMER: I take exception, your Honor, at this time.

MR. COLICCHIO: The defendant Yagy joins in the same request previously made by Mr. Kremer.

THE COURT: Same ruling.

MR. MOREHOUSE: The defendant Schwartz also, your Honor.

THE COURT: Same ruling.

MR. HOULIHAN: Mr. Catanese, is there anything that you read in the newspapers or heard any place else in connection with Mr. Hook that would affect your judgment in this case, had you formed any opinion?

JUROR #4: No, I didn't. Just what I read in the papers, and it recalled it to mind.

MR. HOULIHAN: From what you have read?

JUROR #4: I don't know anybody personally.

MR. HOULIHAN: Did you form any opinion at the time that you read that article?

JUROR #4: Not really, because I just --

MR. HOULIHAN: You were just reading it in the newspaper?

JUROR #4: Yes.

MR. HOULIHAN: Would the fact that Mr. Hook will be called to testify in this case, would that affect your judgment, what you read, would that affect your judgment of Mr. Hook's testimony in any way?

JUROR #4: Probably not, because I would have to hear the whole story.

MR. HOULIHAN: And would you be fair and judge the testimony as you would any testimony, judging the demeanor and the looks of the individual on what he says?

JUROR #4: No, I think I would be fair. I would want somebody to be fair with me if I was in his position or somebody else's position, I would want him to be fair.

MR. HOULIHAN: Does anyone else recall? Mr. Gordon?

JUROR #9: I probably recall more from the previous comment, I mean, than from any news article or TV reporting. I guess I feel I ought to respond to the question that came out, whether I had seen or heard anything. If the man was actually stabbed, I don't have any proof of that beyond what I read in the newspapers, it would, I guess, to me anyway, tend to lend credence to his testimony, if it was concerned with that, if that was part of it.

MR. HOULIHAN: If this were part of the evidence?

JUROR #9: If it were connected.

MR. KREMER: I dislike interrupting you, but I have to approach the bench, and I ask you, sir, to come up here with the Judge.

(Thereupon the following conference ensued at the bench.)

MR. KREMER: Your Honor, at this time I am going to renew my request for a mistrial. Mr. Gordon said he is going to convict my client. Mr. Gordon stated that the stabbing is going to lend credence to the testimony of Mr. Hook, and he said it in front of all of the jurors, all of the prospective jurors seated outside behind the rail, and there are now approximately seventy five people or so that have heard him say that he would convict, that there would be credence lent to the testimony, that Hook would be bootstrapped up to believability. If your Honor please, had this matter come out in chambers or some other location where the witness had been questioned, he wouldn't have poisoned the rest of the jury.

THE COURT: You mean the prospective jury?

MR. KREMER: Yes, all being poisoned at that particular time. My client can't receive a fair trial, and I will ask for a mistrial.

MR. MO[illegible]EHOUSE: Schwartz joins in the motion.

MR. COLICCHIO: On behalf of the defendant Yagy, we join in the motion for a mistrial. It is apparent that the Government is attempting to prove a homicide case to support a bank robbery case. The entire trial is going to be viewed with the business of the stabbing of this man in order to give credence to his testimony or attempt to give credence to his testimony. The juror Gordon, who apparently has had service in the military courts, both as a prosecutor, defense representative and judge, is going to be looked to as a person among the jurors, if he is selected as a juror, to give guidance and weight to the testimony, and he, himself, has stated that the fact that the man may have been stabbed will lead him to give credence to the testimony. As I advised the Court, Yagy hasn't been indicted for the stabbing, the Government knows well that my defendant, Yagy, wasn't in this community when it happened. The other two defendants were indicted for the alleged homicide of Mr. Hook.

THE COURT: Well --

MR. COLICCHIO: We join in the motion for a mistrial and also I again renew my motion for a severance on behalf of the defendant Yagy. Logically, there is no way that this jury is going to severe its thoughts between Yagy, Schwartz and Lord.

THE COURT: We are concerned about the statement made by Mr. Gordon that if, in fact, it was shown that Mr. Hook were stabbed, and he took the stand, that he is going to consign some greater level of credibility to the testimony of Mr. Hook. That is all we are concerned with. That seems clearly assailable in your argument, and otherwise, by the fact that if someone is stabbed and comes in and is testifying against those one or more who are alleged to have been responsible for the stabbing, that the testimony patently becomes less credible because he is in here as a matter of vengence, getting back at these people. I think that is an overriding consideration. I see nothing that happened to this point that necessitates a mistrial, and I again deny your motion for a severance, Mr. Colicchio, and I deny the motions for a mistrial.

MR. COLICCHIO: Exception.

MR. KREMER: Exception.

MR. MOREHOUSE: Schwartz excepts.

(Thereupon the conference at the bench was terminated.)

MR. HOULIHAN: Mr. Gordon, considering what you know now, from your recollection of either reading newspaper articles or television reports, can you think of any reason why you wouldn't be fair and impartial in this particular case? Would you be able to listen to the evidence that is admitted in this case, judge it fairly and impartially?

JUROR #9: As partially as I am able to. I may be unaware of biases.

THE COURT: This means you will listen to anything that comes in, there may be things you don't know about that you will hear --

JUROR #9: Yes.

THE COURT: We need to know whether there is any present bias or predisposition one way or the other?

JUROR #9: No, sir.

MR. HOULIHAN: You haven't formed any opinion about this case at this point, have you?

JUROR #9: No, sir, I haven't.

MR. HOULIHAN: And you would listen to the evidence as it comes in and the instructions given to you by Judge Elfvin before you deliberate, and then during your deliberations you would judge that evidence as fairly and impartially as you could at that time?

JUROR #9: Yes, sir.

MR. HOULIHAN: Does anyone else recall reading anything about this or hearing anything? Thank you. Mrs. Kinard, do you have any children?

JUROR #1: Yes.

MR. HOULIHAN: And how old is the oldest?

JUROR #1: Sixteen.

MR. HOULIHAN: How many do you have?

JUROR #1: Two children, sixteen and fourteen.

MR. COLICCHIO: I can't hear.

JUROR #1: I have two children, sixteen and fourteen, boys.

MR. HOULIHAN: What bank -- I don't think Judge Elfvin asked you what bank you were a teller at?

JUROR #1: It was in Rhode Island.

MR. HOULIHAN: Mrs. Levatino, I believe you said you were an editor at Eastman?

JUROR #2: That is correct.

MR. HOULIHAN: What kind of -- are these news articles?

JUROR #2: Publications regarding the hardware we manufacture.

MR. HOULIHAN: So that it would be larely technical?

JUROR #2: That is right, sir.

MR. HOULIHAN: Miss Walker, you are married, you work at Eastman Kodak?

JUROR #3: Yes.

MR. HOULIHAN: Do you have any children?

JUROR #3: Two, a boy and a girl.

MR. HOULIHAN: How old is the oldest?

JUROR #3: Eleven, the girl is five.

MR. HOULIHAN: Mr. Catanese, I understand you are a meat manager at -- what market is that?

JUROR #4: That is in Lima, New York.

MR. HOULIHAN: Have you worked in Rochester?

JUROR #4: Yes, I worked for Star Supermarkets.

MR. HOULIHAN: How long ago was that?

JUROR #4: Well, I left the company in 1964.

MR. HOULIHAN: Do you have any children?

JUROR #4: One son, eight years old.

MR. HOULIHAN: Mrs. Chester, you are married?

JUROR #5: Yes.

MR. HOULIHAN: Do you have any children?

JUROR #5: Two grown, one is married and teaching, the other is a junior in college.

MR. HOULIHAN: Mrs. Liberatore, you are married, ma'am?

JUROR #6: Yes.

MR. HOULIHAN: I didn't catch what your husband did?

* * * * * *

would rather swear the jury and get it out of the way and have it done with.

MR. COLICCHIO: No objection.

MR. MOREHOUSE: No objection.

THE COURT: All right.

(Thereupon the conference at the bench terminated.)

THE COURT: You twelve people will be the prime jury in the case. I am going to select two alternates against the eventuality that during the contemplated three additional days of trial in this case that something might happen to one of you that might prevent you from coming in, and we will have two alternates, and they in succession might take your place as needed, so we can be assured of having twelve people throughout the whole continuation of the trial. So I will swear you, as the jury, at this time.

(Thereupon the jury, having been duly empaneled, was sworn.)

THE COURT: The twelve of you may leave at this time and come back in the morning. First of all, will you show them the room to which they will be coming back to in the morning. Come there at nine o'clock in the morning and we will bring you into the courtroom with the two people who I am going to select now as the two alternates, and we will commence the case in the morning at nine o'clock. Now, don't go to the Columbia Savings and Loan Association. If you know about it already, that is fine. Don't talk among yourselves about anything that you have heard. You have heard just a little bit about the case. Don't talk with anyone else about the case, and if someone tries to talk with you about the case, make sure that I find out about it right away. It is possible that you might, as you leaf through the newspapers, see some item concerning the case, concerning its background, and I ask you, if you do, to make yourself not read it, not listen to anything that might be on the radio, and not listen to or see anything that might be on television. I don't know that there is going to be anything, but we want to keep you insulated from it to the degree that we can. If inadvertently you do have an exposure to such, just put it out of your mind, and if you find you are unduly influenced by it, you can tell me tomorrow morning or some day whenever it happens. We want to keep you from the outside factors and have you concentrate on the evidence in the case. You have none of that at this point. You will get it all in the courtroom and no place else. We will see you in the morning. Take your personal clothing with you at this time, take whatever you have.

(Thereupon the jury exited the courtroom at 3:55 P.M.)

THE COURT: As far as the other prospective jurors are concerned, we have approximately twenty four individuals available to us for the selection of these two alternate jurors. I deem, and the attorneys have concurred in that, that six persons will be a sufficient number from which to select those two alternate jurors. So on that basis we will at random call the names of six persons, and those six persons

* * * * * *

Excerpts of Voir Dire Questioning, dated 2-8-77.

(Thereupon the two alternate jurors, having been duly empaneled, were sworn.)

E COURT: All right. Will you show them to the room? You will also come back at nine o'clock tomorrow morning and you will be with the other twelve jurors at that time. You heard my admonition to them concerning any publicity that may attend the case, and my urging you not to read about it or listen to the degree that you are able not to do that, and not to talk to anybody about the case, either among yourselves or somebody outside. If somebody else outside tries to talk with you, make sure I find out about it right away. You may go, and we will see you at nine o'clock in the morning. The remaining four prospective jurors are free to go at this time. Thank you very much. We will let you know when we next need to have you back. Thank you very much.

(Thereupon prospective jurors exited the courtroom.)

I hereby certify that this record is a true and accurate transcript from my stenographic notes in this proceeding

Official Reporter
U.S. District Court

* * * * * *

THE COURT: Are you ready, Mr. Houlihan?

MR. HOULIHAN: Yes, your Honor. Your Honor, I haven't received a copy of the motion papers. I understand, Mr. Morehouse, that it was forwarded to Buffalo rather than to Rochester, and I have not received it. I wonder if there is a copy that I can have.

THE COURT: On what?

MR. HOULIHAN: The motion for the suppression hearing.

THE COURT: The motion never came into being because the proposed order to show cause was sent to me, and rather than executing that and having it become a motion, I got in touch with everybody and indicated that it would come on today, as if it had been moved. There is a copy of the proposed order to show cause and the affidavit to support it, which, of course, I read to you twice over the telephone.

MR. HOULIHAN: That is correct, your Honor. The Government is ready to proceed.

THE COURT: All right.

(Government's Exhibits 1 through 19 were premarked for identification.)

Suppression Hearing Testimony of Special Agents Richard K. Berry and William F. Hutton, dated 2-8-77.

RICHARD K. BERRY, One Sheraton Plaza, New Rochelle, New York, called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HOULIHAN:

Q. Mr. Berry, by whom are you employed, sir?

A. Federal Bureau of Investigation.

Q. How long have you worked for the FBI?

A. Sixteen years.

Q. Where is your duty station?

A. New Rochelle, New York.

Q. During the course of your duties as a special agent of the FBI, did there come a time that you became involved in an investigation regarding one Gerhard Schwartz?

A. Yes, sir.

Q. And during the course of that investigation, did there come a time that you interviewed Mr. Schwartz?

A. Yes, sir.

Q. And when was that interview?

A. It was on the --

Q. I show you Government's Exhibit 6.

THE COURT: What was the answer?

MR. HOULIHAN: He didn't know or --

THE WITNESS: I don't recall the exact date.

THE COURT: All right.

BY MR. HOULIHAN:

Q. I show you Government's Exhibit 6 marked for identification, does that refresh your recollection?

A. Yes, November 22, 1976.

Q. And where did that interview take place?

A. In the FBI Office in New Rochelle.

MR. MOREHOUSE: The defendant respectfully requests leave to conduct preliminary questioning on the document in front of the agent.

MR. HOULIHAN: I haven't offered it.

THE COURT: Not yet, Mr. Morehouse. However, the document should be set aside, Mr. Berry, while you are answering the questions. All right, go ahead.

BY MR. HOULIHAN:

Q. Mr. Berry, during the course of this interview, who was present at that time?

A. Special Agents Robert Martineau and William Hutton.

Q. With regard to Special Agent Martineau, are you aware where he is today?

A. Yes, sir, he is home, he is sick.

THE COURT: In what way?

THE WITNESS: He has a -- I don't know exactly, he has been incapacitated for sometime.

BY MR. HOULIHAN:

Q. Showing you Government's Exhibit 7, can you tell us what that is?

A. This is a note from the doctor of Agent Martineau.

Q. Showing you Government's Exhibit 8, can you tell us what that is?

A. A photograph of Agent Martineau.

Q. Now, during the course of the interview with Mr. Schwartz were you present at all times?

A. Yes, sir.

Q. Did there come a time that you left the room for any reason?

A. I left on one occasion when Mr. Schwartz was on the telephone.

MR. MOREHOUSE: I object to the form, no foundation laid as to the location of the room or time or place.

THE COURT: It was in the FBI Office at New Rochelle. That is satisfactory at this point. What was the last question and answer?

(Thereupon the last question and answer was read by reporter.)

THE COURT: All right.

BY MR. HOULIHAN:

Q. Now, how long were you out of the room?

A. I was out of the room for approximately fifteen minutes.

Q. And when you returned to the room was Mr. Schwartz still on the telephone?

A. Yes, he was.

Q. Now, approximately what time did you arrive at the FBI Office in New Rochelle?

A. I believe we arrived about nine thirty.

THE COURT: Who is "we"?

THE WITNESS: The agents who I previously mentioned, Martineau and Hutton, and the other agents participating in the arrest.

THE COURT: Just the three of you?

THE WITNESS: The three of us stayed with Mr. Schwartz.

THE COURT: You said "We arrived at the FBI Office," you've got three agents, was somebody else with you?

THE WITNESS: There were approximately twelve agents that were in on the arrest in various stages.

THE COURT: Was someone there other than the agents?

THE WITNESS: No, sir.

THE COURT: All right.

BY MR. HOULIHAN:

Q. I show you Government's Exhibit 9 marked for identification, can you tell us what that is?

A. This is a running log of the arrest and the interview with

Mr. Schwartz on November 22, 1976.

Q. And that log consists of four separate pages, and your signature appears on the bottom of that log, is that correct?

A. Yes, it does.

Q. Along with other agents, is that correct?

A. That is correct.

MR. HOULIHAN: I offer the interview log.

THE COURT: What is the number?

MR. HOULIHAN: Government's Exhibit 9, your Honor. I'm sorry I did not provide the Court with a list.

THE COURT: You did say it, but I missed it.

MR. KREMER: If the Court please, on behalf of the defendant Lord, if this confession were illegally obtained then my client, who is mentioned in there, named, would be suffering from the fruits of an illegally obtained confession, and there would be a primary taint to that which would extend to my defendant. At this time, your Honor, will defendant Lord be accorded standing to make any objections or to participate in any way in this proceeding? The defendant Lord would argue under the doctorine of Wong Sung versus United States, although that was not a confession case, that if there is a primary taint, a primary illegality, that it would then extend to the defendant Lord, and he should have the opportunity to participate in this procedure which vitally affects his rights.

THE COURT: I don't yet know whether I will afford you an active participation. I probably would allow you some degree of participation, I don't know how much. I want to let the thing progress normally. Obviously, anything that is received at this point is received for the purpose of this hearing only and is not coming into evidence on trial. So if there be something prejudicial to Mr. Lord, for example, in Government's Exhibit 9, the fact that I receive it now, if I do, does not hurt Mr. Lord at all.

MR. COLICCHIO: On behalf of the defendant Yagy, it is my understanding that if there is a co-defendant who is aware and failed to participate in any suppression hearing, that he waives certain rights that he may claim to have during the course of the trial in the event he tried to attack the confession or admission. So on behalf of the defendant Yagy --

THE COURT: Keep applying to participate. That is all you have to do to preserve your position.

MR. COLICCHIO: Absolutely.

THE COURT: All right. Mr. Morehouse carries the burden, we will see where we are. Government's Exhibit 9 has been offered, and you have it in hand, do you have any objection or do you want to --

MR. MOREHOUSE: Yes, your Honor, I would like to ask Mr. Berry a few questions.

THE COURT: You may.

PRELIMINARY EXAMINATION BY MR. MOREHOUSE:

Q. Agent Berry, inviting your attention to Government's Exhibit 9, you described it as a running log, did you? I didn't catch it.

A. Running log of the arrest and the interview with Mr. Schwartz.

Q. When did it start to run?

A. At 8:35 A.M., at the time Mr. Schwartz was arrested.

Q. Did you make the entry at the time of the arrest or how do you handle these logs?

A. This was made by Agent Martineau. He made the notes as he came back, and continued the log all the way through.

Q. As you were going back to your office building?

A. Yes. He started at eight thirty-five --

Q. Martineau started at eight thirty-five?

A. Yes, Martineau started writing the log at eight thirty-five in the apartment that Mr. Schwartz was arrested in.

Q. You were there?

A. Yes, I was. He continued right until the time Mr. Schwartz was turned over to the United States Marshal.

Q. And were you with Martineau at all times during the compilation of this document?

A. No, I was not.

THE COURT: Do you mean during all the time covered by the running log or during the time when somebody actually put it together?

MR. MOREHOUSE: When it was actually drawn.

THE COURT: Do you understand that question?

THE WITNESS: Yes.

THE COURT: Which way do you understand it?

THE WITNESS: Was I with him the entire time it was drawn.

THE COURT: All right.

THE WITNESS: No, I wasn't with him the entire time it was drawn. I stopped --

THE COURT: You mean the entire time it covers?

THE WITNESS: It covers. I stopped at the time Mr. Schwartz was taken into the Southern District Court House in New York City. Mr. Martineau maintained the log from there on.

BY MR. MOREHOUSE:

Q. Didn't you say earlier that that was Martineau's compilation?

A. That is right. I was -- the question was was I with Martineau while he maintained the log.

Q. During the entire time he drew up the log were you with him?

A. No.

THE COURT: Your question is ambiguous. During the time he drew it up or during the time covered by the log.

MR. MOREHOUSE: During the time the log was written and composed.

THE WITNESS: I was with him while he composed the log until the time I left, when they went into the Court House. Mr. Martineau continued the log afterward.

BY MR. MOREHOUSE:

Q. You think, you were not there?

A. No.

Q. Show me, Agent Berry, at what point in the log you separated from Martineau?

A. At 3:09 P.M.

Q. Are the pages numbered?

A. This would be Page 5, the bottom of Page 5 -- 307 -- excuse me -- 3:07 P.M.

Q. At three-o-seven is when you went to the Southern District Court?

A. Right.

Q. With Schwartz?

A. That is correct.

THE COURT: I gather, Agent Berry, that this was a log, a running log that was kept contemporaneously or simultaneously as the things were happening?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

MR. MOREHOUSE: Your Honor, I think the first few pages are clearly admissible as a work product. I don't think Agent Berry can testify as to the authenticity or the composition of Pages 5, 6 and 7. I don't think 5, 6 and 7 should come in, but I think Pages 1, 2, 3 and 4 are admissible.

MR. KREMER: The defendant Lord would like to be heard if he has standing on this point.

THE COURT: What is your position on the offer, Mr. Houlihan, are you offering the whole log or part of it?

MR. HOULIHAN: Well, certainly he was there throughout the period of 1 through 5, his name appears on Page 7. I have a witness available who will testify, I believe, as to the whole period of time, your Honor.

THE COURT: Do you withdraw the offer at this time?

MR. HOULIHAN: I will.

THE COURT: All right, go ahead.

BY MR. HOULIHAN:

Q. Mr. Berry, approximately what time did you arrive at the New Rochelle Office, do you remember, sir?

A. No, I don't remember.

Q. Would something refresh your recollection?

A. Yes, we have maintained a log.

Q. Okey. I show you Government's Exhibit 9, and ask you if you can refresh your recollection as to the time you arrived at the New Rochelle Office of the FBI?

A. We arrived at 9:30 A.M.

THE COURT: You have referred to what, Government's Exhibit 9?

THE WITNESS: Government's Exhibit 9.

BY MR. HOULIHAN:

Q. Now, would you tell us, without reference to Government's Exhibit 9, the course of what happened from the time you arrived and the interview with Mr. Schwartz?

A. As best I can recall without the notes, when we arrived in the office Mr. Schwartz was taken to be photographed. He was subsequently brought to the interview room after being photographed, and Agents Martineau, Hutton and I were in the room with Mr. Schwartz, and Agent Martineau at that point again advised Mr. Schwartz of our identities and the charges that were placed against him.

Q. Now, you say "again advised," he was advised sometime previously?

A. Yes, he was advised when we arrested him on Wyatt Street in the Bronx.

Q. Now, you say Agent Martineau introduced all three of the agents?

A. Yes.

Q. Was there anyone else in the interview room at that time?

A. Just the four of us.

Q. What, if anything, did Mr. Schwartz say?

A. Mr. Schwartz wanted to know if he had to go back to Rochester to face the charges.

Q. Who answered?

A. Martineau.

Q. Were you present when he answered?

A. Yes, sir.

Q. What did he say?

A. Martineau told him that he had no idea --

MR. KREMER: Excuse me. Your Honor, if I have permission to intervene at this time, on behalf of the defendant Lord I would like to make an objection. If I have no authority to intervene, I would have to accede to the Court's ruling.

THE COURT: Well, my curiosity compels me to grant you the right to object, I want to see what it is. What objection do you have?

MR. KREMER: Hearsay, your Honor.

THE COURT: All right. He was present.

MR. COLICCHIO: On behalf of the defendant Yagy, your Honor, I raise an objection to any conversation or statements indicating the defendant Yagy in this conversation outside of his presence.

THE COURT: I understand that. I assume, Mr. Kremer, when you say it is hearsay as to Lord, of course, his name had not been mentioned at this time.

MR. KREMER: It is hearsay as to everyone. It is Martineau's statement, as testified to by this gentleman, Agent Berry.

THE COURT: Who was in the presence of Mr. Schwartz. What is hearsay about that?

MR. KREMER: The questions that Martineau is asking are hearsay.

THE COURT: No, overruled.

MR. KREMER: Thank you, your Honor.

BY MR. HOULIHAN:

Q. You may answer. What did Martineau say to him?

A. Martineau told him that he had no idea if he had to go back to Rochester, he had no control over it, he was being arrested by the FBI in connection with a bank robbery.

Q. Okay. Did Mr. Schwartz say anything in response to that?

A. Not that I can recall.

Q. What, if anything, happened next?

A. As best I can recall, the next thing that happened was I gave Mr. Schwartz the Advice of Rights Form.

Q. You personally gave it to him?

A. I handed it to him, yes.

Q. I show you Government's Exhibit 6 marked for identification, can you tell me what that is?

A. Yes, sir, this is the Advice of Rights Form that I handed to Mr. Schwartz.

Q. What time did you give that Advice of Rights Form to Mr. Schwartz?

A. 10 A.M.

Q. And did you give him any instructions at that time when you gave it to him?

A. Yes, I told Mr. Schwartz to read it, which he did, and upon reading, I asked if he wanted to sign it, and he said yes, and he signed it, and I noted the time of ten-o-four.

Q. It was signed at ten-o-four?

A. Yes.

Q. Did you sign as a witness on that?

A. Yes, I did.

Q. Now, from the time you entered the room with Gerhard Schwartz and the other two agents, and at the time he signed the Advice of Rights Form, was there any conversation with regard to Rule 20?

A. No, sir.

Q. Now, subsequent to the signing of the Advice of Rights Form, the acknowledgment by Mr. Schwartz, did you have a conversation with Mr. Schwartz?

A. Yes, sir.

Q. And what, if anything, was that conversation?

A. In that conversation Mr. Schwartz asked if he could be sentenced in connection with this bank robbery and stay here in New York, and I explained to him at that point, I quoted, I said, "Rule 20, you have to ask your attorney when you get down to Court to explain to you Federal Rule 20, and if both United States Attorneys are agreeable to it, you can plead guilty to a charge and be sentenced in the district in which you were arrested."

Q. When did this conversation take place?

A. This conversation took place just prior to leaving the office.

Q. In relationship to the --

MR. MOREHOUSE: I object to the answer as not responsive. You asked for the time, the time of day I imagine you meant?

MR. HOULIHAN: No, as a matter of fact, that is exactly the answer that I wanted.

MR. MOREHOUSE: I know it is the answer you wanted, but I submit it is not responsive to your question as to time.

THE COURT: You may inquire on cross examination.

BY MR. HOULIHAN:

Q. Now, in relationship to the statements that were given by Mr. Schwartz when did this conversation take place?

A. My conversation concerning Rule 20 took place subsequent to the statement that Mr. Schwartz made.

Q. Now, prior to this time was there -- subsequent to the statements and before he asked the question about Rule 20 and you gave him the explanation that you just advised the Court, was there any question concerning Rule 20?

A. No, sir.

Q. Any questions concerning any of the aspects of Rule 20, other than the original statement, prior to signing the Advice of Rights?

A. No, sir.

Q. Now, at the time that -- after Mr. Schwartz signed the Advice of Rights Form did you question him regarding the bank robbery?

A. Yes, sir.

Q. And what, if anything, did he tell you?

THE COURT: We don't need to know exactly what was said, just whether he gave certain statements and

BY MR. HOULIHAN:

Q. Did Mr. Schwartz give you statements at that time?

A. Yes, sir, he did.

Q. Approximately what time did he start giving statements?

A. May I refer to the log?

Q. Yes, you may.

A. It was subsequent to 11:28 A.M. when Mr. Schwartz began -- at 11:40 A.M. Mr. Schwartz began furnishing oral statements.

Q. Now, in relationship to eleven forty, were you in the room from eleven forty on?

A. Yes, sir.

Q. And just prior to eleven forty what occurred, what was Mr. Schwartz doing?

A. Mr. Schwartz had requested permission to place a telephone call to his wife in Rochester, and we let him make the phone call to his wife.

Q. And you left the room for a short period of time during the phone call?

A. Yes, sir.

Q. He was on the phone when you left?

A. Yes.

Q. He was on the phone when you returned?

A. That is right.

Q. Okay. Now, Mr. Schwartz then gave you statements, is that right?

A. That is correct.

Q. Those were oral statements?

A. Yes, sir.

Q. What, if anything, happened after he gave you the oral statements?

A. After he gave the oral statements, Agent Martineau, who was taking the handwritten notes, immediately left the room, and he dictated the notes to a secretary.

THE COURT: You don't know what he did?

THE WITNESS: Well, he left the room with the notes.

BY MR. HOULIHAN:

Q. And he came back subsequently?

A. Yes.

Q. Did he have anything with him when he came back?

A. Yes, he had the Advice of Rights Form that I had furnished Mr. Schwartz, and he had a series of typewritten pages.

Q. Now, this series of typewritten pages, you are referring now to the pages attached to Government's Exhibit 6, consisting of four pages, is that right?

A. That is correct.

Q. What, if anything, was said to Mr. Schwartz after Mr. Martineau returned with those typewritten pages?

A. The pages were handed to Mr. Schwartz and he was told to read them, which he read in its entirety in our presence, he initialled each page as he read it and dated the same. He was instructed to check and make sure there was no inconsistencies in what he had said with what was typed.

Q. Did he make corrections on that?

A. Yes, he made one correction.

Q. On what page is that?

A. Page 5.

Q. Page 5 of Government's Exhibit 6, is that right?

A. That is correct.

Q. And the initials that appear on each of those pages, were those made in your presence?

A. They were.

Q. And the date that was put on each page, was that made in your presence?

A. Yes, it was.

Q. Now, after the signing of the statements there was a conversation, Mr. Schwartz asked you concerning Rule 20?

A. That is correct.

THE COURT: Excuse me, concerning what?

MR. HOULIHAN: Rule 20.

BY MR. HOULIHAN:

Q. And I believe you already testified that your response was that both the Assistant United States Attorney in the Southern District of New York and in Rochester, New York would have to agree, and that he could enter a plea of guilty, if they did agree, in the Southern District, is that correct?

A. That is correct.

Q. Did you advise him of anything else at that time?

A. I advised him that he had best discuss the matter in its entirety with his attorney and refer to it as Rule 20 with his attorney, the attorney could advise him in detail.

Q. Did you tell him when he would be appointed an attorney?

A. I told him an attorney would be appointed for him shortly, once he arrived in the Court House in the Southern District of New York.

Q. Subsequent to that did you ultimately leave the New Rochelle Office?

A. Yes, we did.

Q. Prior to the time that you left, other than what you already testified to, was there any question or conversation regarding Rule 20?

A. No, sir.

Q. Approximately what time did you leave the New Rochelle Office?

A. At two o'clock.

Q. And where did you take Mr. Schwartz when you left the office?

A. From the New Rochelle Office we drove to our office in Manhattan, stopped there briefly to have Mr. Schwartz photographed a second time.

Q. Why was he photographed a second time?

A. They were having difficulty with the camera they were using in New Rochelle, and the main photo lab is in the New York Office.

Q. So you had him photographed, how long was he there?

A. Approximately fifteen minutes.

Q. And where did you go after that?

A. From the New York Office we went directly to the Southern District Court House in Foley Square.

Q. Did you have a conversation with Mr. Schwartz at any time prior to the time you arrived at Foley Square --

A. No, sir.

Q. -- concerning Rule 20, after you left the FBI Office?

A. I had a conversation with Mr. Schwartz as we got out of the car in front of Foley Square.

Q. What was that conversation?

A. I shook hands with Mr. Schwartz and I told him that the next time he saw me I would be testifying against him, and I reminded him that when he goes into court he is going to have an attorney appointed for him, and he should remind the attorney to explain in detail the Rule 20 proceedings to him.

Q. At any time during the course of the interview with Mr. Schwartz at the New Rochelle Office of the FBI was there any promises made to him that if he gave a statement there that he could be tried in the Southern District of New York?

A. No.

MR. MOREHOUSE: As far as you know?

THE WITNESS: There were no statements given to him.

MR. MOREHOUSE: As far as you know?

THE WITNESS: I was present through the entire proceedings.

MR. MOREHOUSE: Sir --

THE WITNESS: I was present the whole time he was in our office. The answer to the question is no.

MR. HOULIHAN: I am not finished with direct examination, your Honor.

MR. MOREHOUSE: I am sorry to interrupt you, but the testimony struck me as sort of funny.

THE COURT: All right, Mr. Houlihan.

BY MR. HOULIHAN:

Q. During the course of the interview, other than Special Agent Martineau, who was the other agent present?

A. Special Agent Hutton.

Q. Is Special Agent Hutton here today to testify?

A. Yes, he is.

Q. Can you describe for the Court how tall Mr. Martineau is?

A. Mr. Martineau is approximately five feet ten, five feet ten inches tall.

Q. Is he slender?

A. No, Mr. Martineau is stocky built.

Q. And during the course of the interview who did the talking?

A. I did.

MR. HOULIHAN: You may cross examine.

CROSS EXAMINATION BY MR. MOREHOUSE:

Q. Mr. Berry, perhaps I misunderstood, but I thought there was a five minute period when Mr. Schwartz was on the telephone talking to his wife, as you said, that you were out of the room?

A. That is correct, sir. He was on the phone when I left and when I returned.

Q. It is not exactly accurate to say that you were with him at all times in the proceedings, is it?

A. No.

Q. Do you know -- could you hear his voice on the phone all the time, all the five minutes you were out of the room, were you down the hall or where did you go?

A. I went down the hallway, I went to the men's room.

Q. Did that take you out of hearing of his voice?

A. Yes.

Q. So you don't know what conversation he had with Martineau and Hutton who were in the room?

A. No, I don't.

Q. If conversations were had at all?

A. That is correct.

Q. Mr. Martineau took notes on Mr. Schwartz's statement and then he took the notes somewhere to have them typed up?

A. That is correct.

Q. That transaction took place before Mr. Martineau said in answer to Mr. Schwartz's inquiry, 'I have no idea about the Rule 20 proceedings'?

A. Would you repeat that, please?

(Thereupon the last question was read by reporter.)

THE WITNESS: No, Mr. Martineau never said anything like that.

BY MR. MOREHOUSE:

Q. Who did?

A. Nobody made a statement like that.

Q. I believe as a result of Mr. Houlihan's questioning, you testified in substance that Martineau stated, in the presence of Schwartz and in your presence, to Schwartz, as a result of his inquiry, that Martineau had no idea about the Rule 20 procedure, and I believe you were asked what did Schwartz say then, and I believe you testified you don't recall, does that refresh your recollection on it?

A. That is incorrect, what you are saying.

Q. Am I wrong? I'm sorry, I don't mean to twist it. Where am I wrong?

A. No mention was made -- the phrase Rule 20 wasn't used by Martineau. In the very beginning, after we were introduced and the charges were again explained to Mr. Schwartz, Mr. Schwartz asked if he had to go back to Rochester, and Martineau then told him that he had no idea if he had to go back to Rochester. The phrase Rule 20 was never mentioned by Martineau or anyone else at that point. This is prior to obtaining the statements.

Q. How did you and your colleagues learn of the whereabouts of Mr. Schwartz?

MR. HOULIHAN: Objection, outside the scope of this examination.

THE COURT: Seems so to me.

MR. MOREHOUSE: Sir?

THE COURT: It seems outside the scope of the authenticity or the admissibility of the statements.

MR. MOREHOUSE: If your Honor so rules, I will withdraw the question.

BY MR. MOREHOUSE:

Q. Have you been with the Bureau seventeen years?

A. Sixteen years.

Q. Do you know Mr. Schwartz -- strike that. Did you know of Gerhard Schwartz before you and your fellows apprehended him?

A. Yes, I knew of him.

Q. Did you — you recognized him as a perennial defendant?

A. As a what?

Q. Perennial defendant, a frequent defendant?

A. I recognized him from a case that Mr. Martineau was working.

Q. Was that the Rochester, New York case?

A. Yes, sir.

Q. What did Mr. Martineau do with the handwritten notes that he took of Schwartz's statement, did he bring them back, the original notes, when he brought the typewritten transcript?

A. No, sir, I don't believe he did.

Q. Well, did he or did he not?

A. I don't recall whether or not he did.

Q. Is it your practice and your custom to interrogate defendants in this way, make pen and ink notes on their statement, take the notes and have them transcribed and bring back the typewritten statement for them to sign?

A. That is not my practice.

Q. Is that office practice?

A. No, each agent has his own way. Mr. Martineau types it out, had it typed out. I don't do it, I use my longhand notes.

Q. And have the suspect sign the longhand statement you draw?

A. That is correct.

Q. Were you in charge of this entire proceedings, are you senior agent down there?

A. No, I'm not.

Q. Were you in charge on this particular arrest?

A. No, Martineau was.

Q. Martineau was in charge?

A. That is correct.

MR. MOREHOUSE: Would you mark this?

(Thereupon FD-302 was marked Defendant's Exhibit 1 for identification.)

BY MR. MOREHOUSE:

Q. I show you Defendant's 1 marked for identification, and ask what it is?

A. This is a 302, it is an interview form, of Gerhard Julius Schwartz.

Q. The first page is, you mean?

A. Well, in its entirety. This is a copy -- with the exception of the first paragraph, this is a copy of the statement that Mr. Schwartz made to us.

Q. Which Agent Martineau had transcribed by the typist in the next room?

A. In the office, yes, sir.

Q. I invite your attention to Page 5 of this purported copy. You testified that on Page 5 Mr. Schwartz had initialled an error, dated an error in the typing.

A. On the original statement on Page 5.

Q. I know. I am inviting your attention to this exhibit only.

THE COURT: He never said it was on Page 5 of Defendant's Exhibit 1.

MR. MOREHOUSE: Sir?

THE COURT: He never said the correction was on Page 5 of Defendant's Exhibit 1.

MR. MOREHOUSE: Well, if it were on Page 5 of the original, it would have to be on Page 5 of the photocopy.

THE COURT: That may not follow. You can ask concerning that.

MR. MOREHOUSE: Am I ordered not to continue this line of questioning?

THE COURT: I am saying you are putting words in Mr. Berry's mouth.

MR. MOREHOUSE: I am cross examining him, sir.

THE COURT: You are misclassifying what he said. He never said anything about Defendant's Exhibit 1, he was talking about the original statement. He said on Page 5 of that that Mr. Schwartz had made one correction.

MR. MOREHOUSE: Yes.

THE COURT: Now you have showed him a 302 form, which is Defendant's Exhibit 1, and you have said to him that he said there was a correction on Page 5 of Defendant's Exhibit 1. I am only saying that he never said that.

MR. MOREHOUSE: I see.

BY MR. MOREHOUSE:

Q. Well, let me compare these. Now, where is the correction that you picked up on Page 5, initialled by Mr. Schwartz?

A. It would be on Page 6 of yours. Shall I read the paragraph?

Q. No, point it out to me on this exhibit.

A. The correction is not on the exhibit, on your exhibit.

THE COURT: You mean the fact of the correction, the actual crossing out and interliniation is not on Defendant's Exhibit 1?

THE WITNESS: That is correct, your Honor.

THE COURT: Yours is not a photo of the statement, yours is a photo of a 302 which, as I understand, Mr. Berry, is something that is prepared separately from the statement itself, is that correct?

THE WITNESS: That is correct, your Honor.

THE COURT: And if the correction had been made on the original statement, and you were incorporating that statement in the 302, would you not set forth in the 302 the corrected statement, rather than the original with the correction?

THE WITNESS: The corrected statement would be on the 302, not where it is crossed off.

MR. MOREHOUSE: Not the correction itself, but the corrected statement?

THE COURT: The statement as corrected would be in the 302, is that right?

THE WITNESS: That is correct, your Honor.

BY MR. MOREHOUSE:

Q. I have never been provided with a copy of the original 302, have I?

A. Yes, you have.

THE COURT: You've got the original 302, not the original statement.

MR. MOREHOUSE: Well, what good is the 302 if it's not the original?

THE COURT: All right, that is a point. I think perhaps you are entitled to the statement, a copy of the statement.

MR. MOREHOUSE: I believe so.

THE COURT: Sometimes the oral statement is not reduced to writing and signed, and only comes into written form as part of the 302, which recaps what a person said. In this case where we have a written and purportedly signed statement, certainly it should be that statement which is handed to the defense counsel, Mr.

Houlihan.

MR. HOULIHAN: Your Honor, the statement, the original statement was just brought to me last evening.

THE COURT: All right.

MR. HOULIHAN: Certainly Mr. Morehouse may have a copy of the original statement if he desires.

THE COURT: Very good.

BY MR. MOREHOUSE:

Q. I am bound by your opinion, Agent Berry, how does the original statement differ from Defendant's Exhibit 1, what is the difference?

A. On Page 5 of the original statement --

Q. Here.

A. The third sentence of the first paragraph -- the third sentence from the bottom of the first paragraph -- do you want me to read it?

Q. I can read it, thank you.

A. The word "to" has been crossed out.

THE COURT: Is that T-o-o

THE WITNESS: T-o, and crossed out, and the initials G.J.S. appear above it. Now this, on Page 6 --

THE COURT: You are saying "this"?

THE WITNESS: Defendant's Exhibit 1, on Page 6 of Defendant's Exhibit 1, it has been corrected, and that correction is left out, it would be right here, "drove back towards town."

BY MR. MOREHOUSE:

Q. You just corrected the grammar?

A. Just corrected the grammar, that is all they did, that is the only correction.

Q. Is that the only difference?

A. That is the only difference I can see.

Q. Do you want to look them over and tell me if there are any other differences?

A. There is, as I pointed out before, the first paragraph on your 302.

Q. In addition to that, though?

A. In addition to that? That is the only correction I can find.

Q. The only difference?

A. Yes, sir.

Q. Did you observe in examining Defendant's Exhibit 1 that the initials G.J.S. and numbered pages do not appear on the pages provided to me?

A. That is correct.

Q. Although the recitation appears in Defendant's Exhibit 1, "I have initialled corrections, I have also initialled and dated the four previous pages."

A. That is correct.

Q. Of the original?

A. Of the original.

Q. Apparently the photograph don't show through of the signed initials on my --

THE COURT: It is not a photostat of the original.

THE WITNESS: It is not a photostat.

BY MR. MOREHOUSE:

Q. I understand, but if it recites that he has initialled the pages, and the pages are not initialled, there is something wrong, isn't there?

THE COURT: Can you explain it, Mr. Berry?

THE WITNESS: The document you have, sir --

BY MR. MOREHOUSE:

Q. Defendant's Exhibit 1?

A. Defendant's Exhibit 1, is not a photostat of Government's Exhibit 6.

Q. Correct.

A. The defendant Schwartz's initials appear on Government's Exhibit 6.

Q. Which is your 302 form?

A. Which is the federal Advice of Rights Form.

Q. Is that a 302?

A. No, it is not.

Q. Pardon me.

A. Defendant's Exhibit 1, which you have, is the 302 form, and on that form Mr. Schwartz initials do not appear.

THE COURT: I take it you mean that on the original of that which Defendant's Exhibit 1 is a photostat, his initials do not appear?

THE WITNESS: That is correct.

THE COURT: It is not a matter of poor photostating.

MR. MOREHOUSE: It is just that they don't show.

THE COURT: I know, I understand.

BY MR. MOREHOUSE:

Q. Tell his Honor, Mr. Berry, when you were Mr. Schwartz all the time, both where he was arrested, and in an automobile driving back to your office, and in your office, would you describe the physical description of Mr. Schwartz to his Honor.

MR. HOULIHAN: I think the substance of this inquiry is that a promise was made to him that all matters could be taken care of in the Southern District of New York. The physical condition of Mr. Schwartz is irrevelant to this motion, as I understand it.

THE COURT: I will allow the answer.

MR. MOREHOUSE: Thank you.

THE WITNESS: When we arrested Mr. Schwartz he was wide awake, he was standing just inside the door to the apartment. He was unkempt, he had long hair, and he needed a shave, he had a beard.

BY MR. MOREHOUSE:

Q. Was he wearing glasses the first time you saw him?

A. No, sir.

Q. Was it you or Agent Martineau who held Mr. Schwartz up against the wall when he was frisked, do you remember?

A. No, I don't recall who held him up against the wall.

Q. Who frisked him?

A. I don't recall who frisked him.

Q. You don't. You recall he did not have his glasses on?

A. Yes, sir.

MR. MOREHOUSE: I have no more questions of Mr. Berry. Thank you.

MR. HOULIHAN: Do you have Defendant's Exhibit 1?

REDIRECT EXAMINATION BY MR. HOULIHAN:

Q. Special Agent Berry, referring now to Defendant's Exhibit 1, that is a 302 form which bears the signature of three people, is that correct?

A. That is correct.

Q. And I show you Government's Exhibit 10 marked for identification, can you tell me what Government's Exhibit 10 is?

A. Government's Exhibit 10 is the original of Defendant's Exhibit 1.

Q. Now, Defendant's Exhibit 1 has six pages, any other pages on Government's Exhibit 10?

A. It is ten pages.

Q. What are the other three pages?

MR. MOREHOUSE: I think the exhibit speaks for itself, your Honor. I object upon those terms.

THE COURT: If it is going to speak for itself it has to be received and I have to look at it. Do it one way or the other, he can tell me or I can look at it. I see no objection to him saying what they are. Go ahead.

THE WITNESS: The additional four pages of Government's Exhibit 10 are additional statements that Mr. Schwartz made, and also a physical description of Mr. Schwartz.

BY MR. HOULIHAN:

Q. Now, the additional statements, those are oral statements in addition to the written statements?

A. That is correct.

Q. And were those statements made to you?

A. Yes, sir, they were.

Q. And Government's Exhibit 10 marked for identification, that is the original 302 covering not only the signed statement, but also oral admissions made by the defendant, Gerhard Schwartz?

A. Yes, sir.

THE COURT: Do the oral statements have anything to do with the Rochester bank robbery?

THE WITNESS: Yes, sir, some of them.

THE COURT: Are these provided?

MR. HOULIHAN: Your Honor, there was no motion made. It is my understanding that Mr. Morehouse arrived at my office and asked for copies of the statements and my secretary made a copy of them. I have no idea what was given to him, only that he came in and asked for them. I presume that everything was given to him. I honestly don't know.

THE COURT: All right. What he handed over to the witness as Defendant's Exhibit 1 is something less than a copy of Government's Exhibit 10?

MR. HOULIHAN: That is right, your Honor.

BY MR. HOULIHAN:

Q. Now, the information that is contained in the oral admission, was that information provided by Mr. Schwartz?

A. Yes, sir.

Q. Was that provided before or after your conversation regarding Rule 20?

A. Before our conversation regarding Rule 20.

Q. Do you see Mr. Schwartz here in the courtroom?

A. Yes, sir.

Q. Would you describe what he is wearing?

A. Mr. Schwartz is wearing a light blue suit, a white shirt and blue tie. He has a salt and pepper crew cut.

MR. HOULIHAN: No further questions.

MR. KREMER: Your Honor, on behalf of the defendant Lord, I would like an opportunity to cross examine this witness.

THE COURT: All right. The statements we have been talking about in Government's Exhibit 6 really is sort of a composite of several statements, is that right, Mr. Berry?

THE WITNESS: Yes, your Honor.

THE COURT: Seemingly, as I have said at one earlier point relative to this case, in three pairs of statements, where he will in one part of a pair tell about an event and talk about only his own participation in it, and then in the other part of that pair he will talk about the same event and have other people involved in it?

THE WITNESS: Yes, your Honor.

THE COURT: And he does that as to three events?

THE WITNESS: That is correct.

THE COURT: All right. Now, as to those other three, I believe there probably is involvement of your client in the second parts of those three pair,

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Mr. Kremar and, of course, you can ask about those.

CROSS EXAMINATION BY MR. KREMER:

Q. Agent Berry, sir, when was Mr. Schwartz arrested, sir?

A. Arrested at 8:35 A.M.

Q. What day, sir?

A. November 22, 1976.

Q. And is it not a fact that he at the time of the arrest was one of the ten most wanted criminals on the FBI list?

A. That is correct.

Q. When you went to arrest Mr. Schwartz you took certain precautions with respect to him, is that not correct?

A. As we do with all people, yes.

Q. You formed a raiding party of approximately ten individuals?

A. Approximately ten.

Q. And how many of these were FBI agents?

A. Everybody was an FBI agent.

Q. Some of the agents were armed with shotguns?

A. That is correct.

Q. You had an arrest warrant for Mr. Schwartz's arrest, isn't that correct?

A. Not correct.

Q. You had no arrest warrant?

A. That is correct.

Q. Do you know whether one existed or not?

A. Agent Martineau told me one existed.

Q. Do you know whether Martineau secured that arrest warrant prior to the raiding party going out to arrest Mr. Schwartz?

A. I don't know.

Q. You had received information from someone that Mr. Schwartz was at a certain location, correct?

A. I did not receive any information.

Q. Some agent had to receive information that Mr. Schwartz was at a certain location, is that correct?

A. I have no idea.

Q. You just didn't -- you went out to a certain location to arrest Mr. Schwartz, correct?

A. That is correct.

Q. Someone had to tell you where to go?

A. Agent Martineau told me where to meet him.

Q. You did not ask Agent Martineau how he happened to find out that you were going to go to that address to arrest Mr. Schwartz?

A. That is correct, I didn't ask him.

Q. So that is all in Agent Martineau's mind, correct, that particular information?

A. As far as I know.

Q. Agent Martineau isn't here today?

A. That is correct.

Q. Now, there were some of the members of the raiding party that were armed with shotguns?

A. That is correct.

Q. At the time that you made the arrest the door was knocked down?

A. Forced open, it wasn't knocked down.

Q. Forced open. And you did not knock first and then force the door open?

A. We did knock.

Q. You knocked once?

A. The door was knocked on, I don't know who knocked on it, how many times he knocked on it.

Q. And did anybody holler 'FBI agents, open the door'?

A. FBI, yes, sir, that was --

Q. Approximately how much time elapsed from the time that FBI was yelled until the door was opened?

A. About one second.

Q. At that time the door opened and how many agents entered the door?

A. Five.

Q. And were shotguns brandished?

A. I believe two shotguns.

Q. They were brandished, were they not?

A. They were carried, yes.

Q. They were carried. And were you one of the five that went

into the door, one of the first five?

A. Yes.

Q. Did you have a shotgun?

A. No.

Q. Did you have a pistol?

A. Yes, I did.

Q. Was the pistol in your holster or in your hand?

A. In my hand.

Q. Was the hammer pulled?

A. No.

Q. The hammer was not pulled?

A. No, never.

Q. The gun was off safety? Excuse me, what kind of a weapon do you wear?

A. A revolver.

Q. Was the safety off on the revolver?

A. No, sir.

Q. Your weapon doesn't have a safety?

A. That is correct.

Q. Your hammer wasn't pulled back on the revolver, ready to fire?

A. That is correct.

Q. Now, did you point your weapon at Mr. Schwartz?

A. Yes, I did.

Q. And what did you tell him to do, if anything, when you pointed your weapon at him?

A. I didn't say anything.

Q. Did any of the agents say anything to him?

A. Agent Martineau did.

Q. What did Martineau say to him?

A. He told him, "Schwartz, you're under arrest, FBI."

Q. Was Schwartz lying down or standing when Martineau first spoke to him?

A. Standing up.

Q. Was he wearing street clothes or was he wearing night clothes?

A. He was wearing street clothes, a T-shirt and pants.

Q. Were they drawers like undershort pants or were they regular trousers?

A. As best I recall, he was wearing trousers.

Q. Did he put his hands up in the air?

A. Yes, he did.

Q. Did he tell you that — what did he say at that instant when he was told, "FBI, you are under arrest"?

A. He admitted that he was Mr. Schwartz.

Q. And there were other people present in the room in the apartment, isn't that correct?

A. That is correct.

Q. There were some women present, is that correct?

A. That is correct.

Q. There were three women present?

A. Two.

Q. Two women. They began to scream?

A. That is correct.

Q. And were there any men present?

A. Yes, one.

Q. And was he placed under arrest?

A. No.

Q. Did he start screaming?

A. No, he didn't.

Q. And the screaming went on until Mr. Schwartz was taken from the apartment, isn't that right?

A. That is incorrect.

Q. How long were you in the apartment until Mr. Schwartz was taken out?

A. We arrived in the apartment at eight thirty-five, we departed the apartment at nine ten.

Q. You stayed there for approximately thirty minutes, correct, thirty-five minutes?

A. Thirty-five minutes.

Q. And at that time did you show him Government's Exhibit 6?

A. No.

Q. You had a conversation with him in the apartment, isn't that correct?

A. I did, yes.

Q. You did. What did you say to him, what did you ask him?

A. I asked him where his gun was.

Q. What else did you ask him?

A. That's all I asked him.

Q. Did any of your colleagues ask him any questions?

A. Not that I know of, not in my presence.

Q. How long were you physically present during that thirty-five minute period?

A. The entire thirty-five minutes.

Q. There was a time when you were away from the presence of Mr. Schwartz and someone else was talking to him?

A. That is correct.

Q. As far as you know, was the first time that Mr. Schwartz has his advice read to him at the New Rochelle Office of the FBI?

A. No.

Q. It was read to him earlier than that?

A. Martineau advised him of his rights.

Q. Where and when?

A. In the apartment, when we had Mr. Schwartz seated in the chair.

Q. With reference to that thirty-five minute span, was it toward the beginning, toward the end, where was it?

A. Toward the beginning.

Q. Toward the beginning. Now, you said that Agent Martineau --

with respect to the statement that Mr. Schwartz had made, you stated Agent Martineau was taking handwritten notes of those particular statements, is that correct?

A. That is correct.

Q. Now, with respect to the reading or the telling or advising Mr. Schwartz of his rights in the apartment, do you know whether or not Agent Martineau made notes with respect to that?

A. Yes, he did.

Q. With respect to those notes, did you bring them with you?

A. I have them right here.

Q. Now, you are pointing to Government's Exhibit 9, you stated that was the log?

A. That is correct.

Q. But is there not another set of handwritten notes that was made by Agent Martineau in addition to that handwritten set?

A. None that I know of, sir.

Q. Will you hand me this exhibit, sir?

A. Yes.

Q. Now, I see on Government's Exhibit 9, Page 4, the notation, "Oral statement"?

A. That is correct.

Q. And I do not see any separate notes of that oral statement, is that correct or are there notes of that oral statement in the log which you have handed me, Government's Exhibit 9?

A. They are not in the log, no.

Q. All right. Now, where are those particular notes?

A. You have them.

Q. The handwritten notes?

A. Not the handwritten notes. I have no idea where the handwritten notes are, sir.

MR. KREMER: Your Honor, in accordance with the doctrine of United States versus John Michael Harris, United States Court of Appeals for the Ninth Circuit, decided September 23, 1976, Docket Number 76-1317, not yet at this point reported in the Federal Reporter, I would ask that all of this testimony be stricken with respect to — I would ask that the statements be stricken by virtue of the fact we have neither Agent Martineau here nor do we have the handwritten notes. In accordance with Brady versus Maryland, which is what Harris directed its attention to, it is an impeaching document, and I don't have those, and I would ask that all of this be stricken, that is, the particular statements which the Court —

THE COURT: As I remember it, the Harris case in the Ninth

Circuit speaks only prospectively, and lays down a rule of operation for the FBI in that circuit. There is nothing yet that has appeared relative to that same situation in this circuit or in the Supreme Court of the United States and, as I have ruled already in an earlier case, I certainly am not going to give it retrospective effect, and I am disinclined to give it any effect in this circuit until there be some declaration by the Second Circuit.

MR. KREMER: My exception, your Honor.

THE COURT: Yes.

BY MR. KREMER:

Q. Now, Agent Berry, you testified that there came a time when Mr. Schwartz was questioned by Special Agent Martineau at your New Rochelle Office?

A. That is correct.

Q. Now, do you know whether Special Agent Martineau had contacted the Rochester Office prior to conducting this interview to talk with anybody at the Rochester Office?

A. I don't.

Q. Subsequently have you learned whether Agent Martineau had any communication with the Rochester Office prior to questioning Mr. Schwartz?

A. I don't.

Q. I'm sorry, forgive me, you don't know whether he had any knowledge of -- strike that. You don't know whether he talked with the Rochester Office?

A. That is correct, prior to taking the statement.

Q. Had you received -- strike that. Is it my understanding that this case was Agent Martineau's case principally?

A. That is correct.

Q. Your duties, as far as this case was concerned, was, one, to go out on the raiding party and, secondly, to be present at the time during the interview that Agent Martineau had at the New Rochelle Office?

A. That is correct.

THE COURT: You did the interviewing?

THE WITNESS: I did the interviewing.

BY MR. KREMER:

Q. Now, who took the oral statements that have been transcribed as Government's Exhibit 6?

A. Agent Martineau took the oral statements.

MR. KREMER: Thank you, sir. I have no further questions of this witness.

MR. COLICCHIO On behalf of the defendant Yagy, may I see the exhibits?

THE COURT: Yes, you may. I don't want to foreclose you, but I hope you won't be repetitious.

MR. COLICCHIO: No, your Honor.

CROSS EXAMINATION BY MR. COLICCHIO:

Q. Sir, to clarify one item, at what point in time on November 22, 1976 was there discussion by Mr. Schwartz with you or someone in your presence relating to implementing Rule 20?

A. Subsequent to taking the statements.

Q. That would be Government's Exhibit 6?

A. Yes.

Q. And with whom did Mr. Schwartz discuss this?

A. He discussed it with me. I discussed Rule 20, I used the phrase Rule 20.

Q. Did he inquire of you something that resembled Rule 20 before you used the phrase Rule 20?

A. Yes.

Q. Was he asking you, 'May I plead guilty to the Southern District of New York, can it be handled in the Southern District of New York'?

A. He wanted to know if he could plead to it here, that is what he was saying when we were in New York City.

Q. You say he made that comment after he had signed Government's Exhibit 6?

A. Yes, sir.

Q. There was no conversation about it before he signed Government's Exhibit 6?

A. No, sir.

Q. Did he ask in your presence that he have an attorney appointed for him before he made any statements that are contained in Government's Exhibit 6?

A. He did not.

Q. Did he ask to withdraw any of the statements that are contained in Government's Exhibit 6 before he signed them?

A. No, he didn't.

Q. Or after he signed them?

A. No, he didn't.

Q. Was a tape recording made of conversations or statements made by Mr. Yagy prior to the transcription of Government's Exhibit 6?

A. By Mr. who?

Q. Not Yagy, Mr. Schwartz?

A. No, there were no tape recordings made, sir.

Q. It is my understanding that as part of Government's Exhibit 10 there are -- the last four pages contain an additional matter referring to Mr. Schwartz?

A. Yes, sir.

Q. Statements made by Mr. Schwartz to you?

A. Yes, sir.

Q. And were these statements made by Mr. Schwartz to you before or during the course of time that the statements contained in Government's Exhibit 6 were made, or subsequent?

A. It was made subsequent to Mr. Schwartz signing Government's Exhibit 6.

Q. May I ask you this, how did Schwartz, about to refer to matters contained in the last four pages of Government's Exhibit 10? How did it come about that he started making statements regarding individuals or the significance of one incident as compared to the other?

A. We were sitting in the room talking afterwards, and I believe he had a milkshake at the same time, and we were talking and going through the contents of the papers that had been in his wallet.

Q. Did you remove some papers from his wallet?

A. Yes, sir.

Q. Do you have those papers with you here?

A. No, they were given back to him.

Q. Now, these statements that are contained in the last four pages of Government's Exhibit 10 you say were made after he signed Government's Exhibit 6?

A. Yes, sir.

Q. And Government's Exhibit 6 was signed what time of the day, sir?

A. One forty-five.

Q. The statements contained on the last four pages of Government's Exhibit 10 I understand were made after signing Government's Exhibit 6?

A. That is correct.

Q. You say he was having a milkshake about that time?

A. He had the milkshake at eleven fifty-five.

Q. Does that refresh your recollection as to when he made the statements contained in the last four pages of Government's Exhibit 10?

A. He made them after he signed this.

Q. After he signed Government's Exhibit 6?

A. That is correct.

Q. He wasn't having any lunch at that time apperently?

A. No.

Q. That is the time frame I wanted to get straight. Well, the papers that you said were in his pocket make reference to some individual --

THE COURT: It was his wallet.

BY MR. COLICCHIO:

Q. Wallet, do they make reference to any individual?

A. There were a series of telephone numbers and locations.

Q. Did you continue to question him after he signed Government's Exhibit 6 about names of individuals?

A. No, sir, not about names of individuals.

Q. Well, in one of the papers you have something about Fast Jerry?

A. He mentioned Fast Jerry in the statement.

Q. Okay. After he signed Government's Exhibit 6 did he continue to talk about Fast Jerry or did you continue to ask him about Fast Jerry?

A. He — Mr. Schwartz made that statement about Fast Jerry.

Q. I am talking about the last four pages.

A. That is what I am saying.

THE COURT: You asked him whether he had questioned —

MR. COLICCHIO: I didn't question him about this particular statement.

BY MR. COLICCHIO:

Q. He continued talking on and you sat listening to him?

A. Yes.

Q. The fourth paragraph down, there appears to be a statement of the implication of one incident to another, is that correct?

A. That is correct.

Q. And did you, yourself, ask Mr. Schwartz about these various incidents and how they occurred and the significance of one to the other?

A. The particular statement in the fourth paragraph on Page —

Q. The fourth last page.

A. — the page we are talking about here, the fourth to the last page of this statement, I asked why that was done, and this paragraph is the answer that Mr. Schwartz gave.

Q. Okay. Now, did there come a time when you were making notes of what Mr. Schwartz was saying?

A. Agent Martineau was making the notes.

Q. You were talking to Mr. Schwartz and Agent Martineau was present, is that what you are saying?

A. That is correct.

Q. While Schwartz is talking to you, Martineau is writing notes?

A. That is correct.

Q. Do you have the notes that Martineau wrote with respect to the contents of the last four pages?

A. No, sir.

Q. Do you know where the notes are?

A. No, sir, I don't.

Q. Did there come a time that you presented the notes to Mr. Schwartz to ask him whether the notes were correct regarding the last four pages?

A. No, sir.

Q. Has Schwartz, to your knowledge, seen the contents of the last four pages in note form?

A. Not to my knowledge, sir.

Q. To your knowledge, sir, was Schwartz shown the contents of the last four pages in typewritten form at anytime, at least while he was in the New York City area?

A. Not to my knowledge.

Q. Was Schwartz advised that someone was taking notes of what he was saying to you simultaneously while he was talking to you?

A. He wasn't advised of it. It was obvious, Martineau was sitting next to him.

Q. Martineau was there?

A. Yes, sir.

Q. I understand that you don't know whether there was an arrest warrant in existence when your group of men entered Mr. Schwartz's apartment?

A. I know there was a warrant in existence.

Q. Because Martineau told you?

A. That is correct.

Q. You never saw that?

A. I never saw that.

Q. Did any of you have it on your person when you went to Schwartz's apartment?

A. Not that I know of.

Q. And did anyone have a search warrant to search Schwartz's apartment?

A. No.

Q. Did anyone apply for a search warrant?

A. Not that I know of.

MR. HOULIHAN: There was nothing seized at the apartment that we are offering in evidence. I think it is way outside the scope of this examination.

THE COURT: Sustained.

MR. COLICCHIO: The reason I asked is there is a number of items listed on the report that he claims to have taken from the apartment, including the weapon, and I am particularly concerned with the weapon to be used as evidence in this case.

THE COURT: Well, what you have referred to Mr. Colicchio, is on, I believe, the third page of my copy, which I think is Government's Exhibit 10, where there are nine enumerated items, is that correct?

MR. COLICCHIO: It is not on Government's Exhibit 10, as we have it before us, it is on documents that were furnished me.

THE WITNESS: That is a separate 302, your Honor.

THE COURT: That is a separate 302?

THE WITNESS: Yes.

THE COURT: It is a 302, the result of an interview on November 22, 1976, dictated November 23, transcribed November 24. There are nine items enumerated on the third page.

MR. COLICCHIO: It is the third page of the set of papers I have, but it is not on any of the exhibits before the witness.

THE COURT: I understand that. It is in the document you have and I have, which Mr. Houlihan furnished.

MR. COLICCHIO: Yes. I wanted to ask the witness one question.

BY MR. COLICCHIO:

Q. On the various documents, Defendant's Exhibit 1 and Government's Exhibit 10, I notice it says, "Interview 11/22/76," and then it says, "Date Dictated 11/24/76." Can you explain for me, sir -- can you explain -- I gather it was dictated for a work copy which was transcribed on November 24, 1976 as a work copy, an office copy.

A. As an office copy for report purposes.

Q. And one other question I have is, on the forms that were given to me, you had an interview on 11/22/76 at Bronx, New York, I have another one that says the same date at New Rochelle, New York. How did Bronx, New York get into this?

A. Bronx is the county in which Mr. Schwartz was arrested.

Q. Then he was taken to New Rochelle, Westchester County?

A. Yes.

Q. Then removed to Manhattan?

A. Right.

MR. COLICCHIO: Thank you.

THE COURT: Anything further?

MR. HOULIHAN: Just two questions, your Honor.

BY MR. HOULIHAN:

Q. First of all, during the course of the interview with Mr. Schwartz was he given anything to eat?

A. Yes, he was.

Q. What did he have?

A. He had a malted milk because he was complaining of an ulcer, he had a hamburger or a cheeseburger.

Q. At the time that you dropped Mr. Schwartz at Foley Square did he make any comment to you about the way he was treated?

A. He said he was treated — when I shook hands with him, he said he was treated like a gentleman.

MR. HOULIHAN: Thank you. No further questions.

THE COURT: All right, thank you.

(Witness excused.)

MR. HOULIHAN: William Hutton.

WILLIAM F. HUTTON, One Sheraton Plaza, New Rochelle, New York, called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HOULIHAN:

Q. Mr. Hutton, by whom are you employed?

A. The FBI.

Q. How long have you worked for the FBI?

A. Approximately eight years now.

Q. And where is your duty station?

A. New Rochelle, New York.

Q. And did there come a time in the course of your duties as a special agent that you interviewed -- assisted in the interview of Gerhard J. Schwartz?

A. Yes.

Q. Can you tell us when that was?

A. November 22, 1976.

Q. And approximately what time did you begin that interview?

A. I would like to refer to that running log, if I might.

Q. I show you Government's Exhibit 9, that is the running log?

A. Yes, this is the exhibit that I would like to refer to. Approximately 9:55 A.M. we began with Mr. Schwartz, at which time we searched him in the room, in the interview room.

Q. Who was present at that time?

A. In the -- for the strip search, myself and Special Agent Berry conducted a strip search. Mr. Martineau left the room to attend to other matters.

Q. Did there come a time that Agent Berry started questioning Mr. Schwartz, interviewing him?

A. Yes, sir.

Q. And prior to that time were you present when Mr. Martineau spoke with Mr. Schwartz?

A. Yes, sir.

Q. And would you tell us, prior to the time the interview started, prior to the time of the signing of the Advice of Rights Form, did Mr. Schwartz ask any questions?

A. Yes, sir, he did ask whether he would be returned to Rochester to face a state charge.

Q. And who answered him at that time?

A. Mr. Martineau.

Q. And what did he say?

A. Mr. Martineau told him that he could not give him an answer to that question, he didn't know whether he would have to --

Q. Now, was there any other question concerning -- at that time concerning returning to Rochester?

A. No, sir.

Q. Now, were you present when the Advice of Rights Form was given to Mr. Schwartz?

A. Yes.

Q. What time was that?

A. He was given the form at 10 A.M.

Q. I show you Government's Exhibit 6, were you present when he signed that form?

A. Yes, sir.

Q. And your signature appears on Government's Exhibit 6?

A. It does.

Q. Subsequent to the signing of the Advice of Rights Form, did Special Agent Berry start asking question of Mr. Schwartz?

A. Yes, he began to interview him regarding background information.

Q. Did there come a time that Mr. Schwartz requested that he be allowed to make a telephone call?

A. Yes, sir.

Q. And prior to the time he made the telephone call was there any conversation -- between the time that he signed the Advice of Rights Form and the time he made the telephone call, was there any conversation concerning Rule 20?

A. No, sir.

Q. At the time that Mr. Schwartz made the telephone call, were you present in the room?

A. Yes, sir.

Q. Were you present in the room when Mr. Berry went out of the room?

A. Yes, I was.

Q. Were you present throughout the period of time that Mr. Berry was gone?

A. Yes, I was present for the entire duration of that phone call.

Q. At any time while Mr. Schwartz was on the phone was there a conversation with either you or Special Agent Martineau or anyone else in that room concerning Rule 20?

A. No, sir.

Q. Did there come a time that Mr. Schwartz made oral statements?

A. Yes, sir.

Q. And in relationship to the phone call, was this before or after the phone call?

A. The oral statements came after the phone call.

Q. And did there come a time that Gerhard Schwartz signed written statements?

A. Yes, sir.

Q. And were you present when he signed those?

A. Yes, sir.

Q. I call your attention now to Government's Exhibit 6 marked for identification, the first page being the Advice of Rights Form which you have signed as a witness, and there are four pages after the Advice of Rights Form, the total exhibit is five pages, and there is a signature on the back page, William Hutton, is that your signature?

A. Yes, it is.

Q. Were you present when Mr. Schwartz read this statement?

A. I was.

Q. And were you present when he made the correction in the statement?

A. Yes.

Q. Were you present when the initials G.J.S. was placed over the correction?

A. Yes, sir.

Q. And were you present when the initials were placed on each of the pages of Government's Exhibit 6?

A. Yes, sir.

Q. Sometime after the signing of -- in addition to the signed statement, did Mr. Schwartz make certain oral admissions?

A. Yes, he did.

Q. I show you Government's Exhibit 10 marked for identification, and call your attention to the last four pages, do those four pages refer to the oral admissions made by Mr. Schwartz?

A. Yes, they do.

Q. And Government's Exhibit 10 is referred to as a 302, is that correct?

A. Yes.

Q. The 302 is a report of an interview that took place on what date?

A. On November 22, 1976.

Q. And when was that transcribed?

A. That was transcribed on November 26, 1976.

Q. And then special agents initalled that, is that correct?

A. Yes.

Q. And are you one of the special agents that initialled that?

A. Yes, sir.

Q. Did you read it before you initialled it?

A. Yes.

Q. And the statements that are contained in that 302, the written statements and the oral admissions made by Mr. Gerhard Schwartz are substantially the same as what is shown in Government's Exhibit 10?

A. Yes, sir.

Q. Now, subsequent to the signing of the written statements and the taking of the oral statements, did there come a time that Mr. Schwartz asked a question concerning Rule 20 or the aspects of Rule 20?

A. Subsequent to the signing of the written statement?

Q. Yes.

A. Yes.

Q. And what was that question, if you recall?

A. He wanted to know whether he could be sentenced in New York City regarding the federal bank robbery charges, and at this time Agent Berry explained Rule 20 to him.

Q. What did he explain to him?

A. Mr. Berry told him that in the federal government there is the ability to plead to a charge in the district in which you are arrested, provided that the United States Attorney in New York and the United States Attorney in Rochester agree that it is an acceptable procedure, and he told him to consult his lawyer, counsel would be appointed at the time of the arraignment.

Q. Now, calling your attention to Government's Exhibit 9, the interview log, were you present the full time covered by that log, it goes to four forty-five?

A. I was not present for the full period of time in the whole log. I was not in the room when he was arrested. I was present from the time that he entered the interview room to be stip searched.

Q. And how about to the end of the day?

A. I was there until the end of the day, yes.

Q. This interview log, Government's Exhibit 9, the last entry is at [illegible] P.M., Deputy United States Marshal Lopez took custody of Mr. Schwartz, were you present at that time?

A. Yes, sir.

Q. Have you read the entire interview log?

A. Yes.

Q. Does it accurately reflect certain of the events that occurred during the day on November 22nd?

A. Yes, it does.

Q. The period of time that you are aware of?

A. Yes, sir.

Q. Now, during the period of time that you were with Mr. Schwartz, which was subsequent to arrest up until the time he was turned over to the United States Marshal, were there any questions, other than those two instances that you testified to, regarding Rule 20 that were made by Mr. Schwartz?

A. No, sir.

Q. How tall are you, Special Agent Hutton?

A. Five seven.

Q. And how much do you weigh?

A. One hundred thirty-five pounds.

Q. And you know Special Agent Martineau?

A. Yes.

Q. How tall is he approximately?

A. Approximately five nine.

Q. And about how much does he weigh?

A. I would say about one hundred eighty pounds, maybe more.

Q. One hundred eighty pounds?

A. Yes, sir.

Q. And other than Special Agent Berry, you and Special Agent Martineau, was there anyone else present during the taking of the oral statements and the written statements in that interview room?

A. Not that I recall.

MR. HOULIHAN: Thank you. Your Honor. I offer Government's Exhibit 6; Government's Exhibit 7, which is a note from the physician regarding the availability of Mr. Martineau; Government's Exhibit 8, which is a photograph of Special Agent Martineau; Government's Exhibit 9, which is a log sheet, Special Agent Berry testified to the first portion of it, Special Agent Hutton testified to the last portion of it, and Government's Exhibit 10, which is the 302 covering not only the written, signed statements, also the oral admissions made by the defendant, Gerhard Schwartz.

BY MR. HOULIHAN:

Q. One last question, Special Agent Hutton. Do you see Gerhard Schwartz in the courtroom at this time?

A. Yes.

Q. Would you please describe where he is sitting and articles of his clothing?

A. He is seated at the table, the defendant's table, wearing a blue suit, he has gray hair, crew cut, blue tie, white shirt.

MR. HOULIHAN: Thank you. No further questions.

MR. MOREHOUSE: Are you offering those?

MR. HOULIHAN: They are all offered.

CROSS EXAMINATION BY MR. MOREHOUSE:

Q. Mr. Hutton, you didn't participate too much in the conversation with Mr. Schwartz, did you, when you were at the FBI Office?

A. No, sir, I more or less observed.

Q. Did you participate in any conversation to any extent when a party went into Mr. Schwartz's apartment?

A. No, sir, I wasn't in the apartment, I was on the outside.

Q. You stayed outside?

A. Yes, sir.

Q. You don't know what conversation, if any, took place inside the apartment --

A. That is correct.

Q. -- for the thirty-five minute period?

A. That is correct.

Q. Can you tell the Court that Agent Berry never told Schwartz, never said to him in substance at any time in response to Schwartz's statement, 'I want to get out of the Monroe County heat, I want to stay down here,' can you deny that Agent Berry said in substance to Schwartz sometime in the proceedings, 'Don't worry, alot of fellows stay down here under Rule 20, there's no problem in that whatsoever, I'll see that you stay here but I need a signed statement from you,' can you tell the Court that Agent Berry never said that?

A. Yes, sir.

Q. You can assure the Court that --

A. I never heard that statement from Agent Berry or anything reasonably depicted.

Q. Could a time have occurred when Agent Berry could have said that and you not heard him?

A. There was -- as I recall, there was only one time when I was out of the room, long enough to get Mr. Schwartz a cup of coffee. The rest of the time I was with Mr. Schwartz from the time that he was in that interview room until the time that he was turned over to the United States Marshal.

Q. This conversation, if it took place, obviously had to take place before the interview room because -- it just had to, if it took place.

THE COURT: Is that a question.

MR. MOREHOUSE: Sir?

THE COURT: Is that a question, are you asking him a question?

MR. MOREHOUSE: I don't know, read it, please, I lost it.

THE COURT: It sounded like a statement, why don't you rephrase the question?

MR. MOREHOUSE: I intend to rephrase it as soon as I know what I asked.

(Thereupon the last question was read by reporter.)

BY MR. MOREHOUSE:

Q. Didn't it?

A. I don't know that for a fact.

Q. In any event, there were thirty-five minutes of conversation, thirty-five minutes of time past when Mr. Berry was with Mr. Schwartz, you were outside the apartment, right?

A. Yes.

Q. You can't really say that that conversation never took place, can you?

A. No, I can't testify to that at all.

MR. MOREHOUSE: No further cross examination.

MR. COLICCHIO: No questions.

CROSS EXAMINATION BY MR. KREMER:

Q. On behalf of the defendant Lord. Agent Hutton, sir, you were present at the time that the interrogation took place between Agent Martineau and Mr. Schwartz?

A. Yes, sir.

Q. And Agent Martineau was asking Mr. Schwartz questions and Mr. Schwartz was giving answers, isn't that correct?

A. Yes, sir.

Q. And it was not a narrative, it wasn't a situation where Agent Martineau said, 'Mr. Schwartz, tell me every single thing you know,' and the agents sat back and Mr. Schwartz rambled on?

A. Not necessarily. A great deal of the conversation was narrative. Introductory questions may have been asked as to what you did in this bank robbery, and they he would lay it out. If there were particular points that were cloudy, questions would be asked to clear up those cloudy areas.

Q. Now, Agent Berry previously testified that he didn't know whether Special Agent Martineau had communicated with anybody in the Rochester, New York Office prior to getting the statement from defendant Schwartz, you heard that testimony?

A. Yes, sir.

Q. Now, do you know, of your own knowledge, whether Mr. Martineau contacted the Rochester, New York Office prior to questioning Mr. Schwartz?

A. No, sir, I don't recall.

Q. You don't. And do you recall whether a warrant had been issued for the arrest of Mr. Schwartz?

A. Yes, I know there was a warrant that had been issued. It was an identification order, fugitive.

Q. Do you know who signed that warrant?

A. No, sir.

Q. When you say "identification order, fugitive," do you mean this was a directive from someone or was an actual arrest order or don't you know?

A. We have a fugitive program, I am sure you have seen pictures in the post office called identification orders, small pictures, and for a man to be placed on this program a warrant has to be issued.

Q. So you are assuming this is usual FBI custom?

A. Yes, sir.

Q. Did you physically see a warrant?

A. Did I see the warrant? No, sir.

Q. You indicated that Mr. Schwartz was brought in and he was immediately stip searched?

A. In the office, yes, sir.

Q. That process involves Mr. Schwartz removing all of his clothes, is that correct?

A. That is correct.

Q. All of the cavities of his body are searched, is that correct?

A. Yes, sir.

Q. Now, at the time Mr. Schwartz was brought in was he prespiring?

A. I don't recall that he was, sir.

Q. Was he speaking in a nervous tone of voice?

A. No, sir.

Q. Did he tell you he wanted to see a lawyer?

A. No, sir.

Q. Did he tell you that he wanted to know why he was being arrested?

A. No, sir.

Q. Did he talk to you at all during the course of the strip search?

A. I don't recall conversation regarding any substantive matter during the strip search. We would ask him for an article of clothing, look through it, finally he was naked, we examined his body, gave the clothing back to him, he put it on.

Q. You were not with the raiding party?

A. I was, sir.

Q. You were with the raiding party?

A. Yes, on the outside.

Q. You did not go in?

A. That is correct.

Q. During the thirty-five minute period that your colleague, Special Agent Berry, testified to, you were on the outside?

A. Yes, sir.

Q. Did Mr. Schwartz appear to be under the influence of drugs when you saw him?

A. No, sir.

Q. Did you ask him whether he had taken drugs?

A. Yes, sir.

Q. Did you ask him whether he had any alcohol?

A. I didn't ask him. Now, these questions were put to him, yes. He was not under the influence of drugs, he was asked that question.

Q. Was he asked that in your presence?

A. Yes, sir.

Q. And this would have been at New Rochelle?

A. Yes, sir.

Q. This was not during the thirty-five minute period when you were standing outside the apartment?

A. No, sir. I did not speak with him at that time at all.

Q. Do you know who propounded these questions, whether he had alcohol or whatever, who propounded those questions to him?

A. Mr. Martineau.

Q. And were you present when he, Mr. Martineau, elicited those responses?

A. Yes, sir.

Q. Did you hear each and every response?

A. Yes, sir.

Q. Now, you don't know where Agent Martineau's notes are, is that correct?

A. No, sir, I don't.

Q. Isn't it a routine policy of your agent to destroy the notes after the 302 has been transcribed?

A. Yes, sir.

Q. So that your best guess would be that those have been destroyed?

A. Yes, sir.

Q. And how long, to the best of your knowledge, has Mr. Martineau been indisposed?

A. Approximately three weeks.

Q. Do you know what the continued prognosis for his indisposition will be?

A. I spoke with him yesterday, and he thought he may be able to come back to work at the end of the week, possibly Friday.

MR. KREMER: Thank you, sir.

THE COURT: Mr. Colicchio?

MR. COLICCHIO: One moment, your Honor.

CROSS EXAMINATION BY MR. COLICCHIO:

Q. Mr. Hutton, with respect to the last four pages of Government's Exhibit 10, the last four pages of Government's Exhibit 10, were you present when any of the statements contained in these last four pages were uttered by Mr. Schwartz?

A. Yes, sir.

Q. He had already signed the signed statement, I believe, Government's Exhibit 6?

A. Yes.

Q. Was Mr. Schwartz asked questions before giving answers or the statements contained on the last four pages of Government's Exhibit 10?

A. As I recall, he did volunteer some of this information, and in volunteering some of it, where points were cloudy, questions were asked.

Q. Now, did there come a time on November 22, 1976 that an attorney was assigned to Mr. Schwartz?

A. Yes, sir.

Q. Were you present when the attorney was assigned to Mr. Schwartz?

A. Yes, sir.

Q. Was the attorney given copies of statements made by Mr. Schwartz at that time?

A. I don't recall that, sir.

Q. Where was the assignment made, at the United States Court House at Foley Square?

A. Yes, the United States Magistrate assigned a legal aide to Mr. Schwartz.

Q. Was he at that time arraigned?

A. Yes, sir.

MR. COLICCHIO: Thank you, sir.

REDIRECT EXAMINATION BY MR. HOULIHAN:

Q. Agent Hutton, at the time that you began the interview what crimes were you aware of?

A. We were aware of the bank robbery that had occurred in Rochester.

Q. And was there other information that Mr. Schwartz volunteered?

A. Yes, sir.

Q. And what was that?

A. He furnished information regarding a supermarket robbery.

Q. Anything else?

A. He furnished information regarding the stabbing of Ronnie Hook.

Q. And you did not know it at the time that you began the interview, is that right?

A. I was aware that Hook had been stabbed, however, I include that in the knowledge of the bank robbery that I had.

Q. But you didn't know about the Wegman's robbery?

A. No.

Q. Mr. Kremer asked you if Mr. Schwartz was nervous during the course of the interview. Can you describe to us his manner during the interview?

A. He was not nervous during the interview, he was very calm throughout the whole interview. He was somewhat upset in talking to his wife, I assume it was his wife, but in our conversation he was very calm and deliberate.

MR. HOULIHAN: No further questions.

THE COURT: Mr. Morehouse?

MR. MOREHOUSE: No cross, your Honor.

THE COURT: Mr. Kremer?

RECROSS EXAMINATION BY MR. KREMER:

Q. When did you first learn about the Hook stabbing?

A. I can't tell you precisely. I was aware of it, I had been assisting Agent Martineau in trying to locate Mr. Schwartz in the area of Yonkers, and somewhere during this investigation, approximately maybe two weeks prior to the arrest, I had become aware that there was a stabbing involved.

Q. So that by the time that Schwartz was arrested, you had received some information through Martineau, from some field office someplace, about Mr. Schwartz's involvement in the bank robbery in Rochester and in the alleged stabbing of Hook?

A. Yes, sir.

Q. You also became aware of the activities of other individuals connected with that bank robbery, is that not correct?

A. Yes, sir.

Q. So that when Mr. Schwartz was interrogated or questioned, your colleague, Martineau, at least had some basis of understanding of what had gone on before so that he could at least frame his questions with some degree of understanding as to what had transpired here in Rochester?

A. Yes, sir.

Q. Now, on this Exhibit Number 9 there is the notation that the arraignment itself took place at four forty-seven in the afternoon?

A. Four forty-seven, arraignment ended.

Q. The arraignment began at four thirty then?

A. Four thirty-seven, arraignment of Schwartz before the United States Magistrate.

Q. Now, you said that you know or at least you were fairly sure that there had been an arrest warrant issued for the defendant Schwartz?

A. Yes, sir.

Q. And you know about or had some inkling as to Schwartz's participation in the robbery and the stabbing of Hook?

A. Yes.

Q. Your office made a raid at the Schwartz address in the Bronx, correct?

A. Yes, sir.

Q. Then from the Bronx you took a car north to New Rochelle, correct?

A. Yes.

Q. Is it closer to -- strike that question. Is it not a fact that it is closer to Foley Square, Manhattan from the arrest than to New Rochelle?

A. No, sir, I think it would be a mile or two closer to New Rochelle.

Q. Now, at that particular time, at the time the raid was concluded, you could have taken him to a United States Magistrate and had him arraigned at that time, couldn't you have?

A. I imagine it is possible, yes, sir.

Q. But for whatever reason, that was not done, was it?

A. That is correct.

Q. And all of these statements -- strike that. Whose decision was it to take Schwartz to the United States Magistrate?

A. Mr. Martineau's.

Q. Mr. Martineau. And he was the person who decided when Mr. Schwartz would be taken to the United States Magistrate, correct?

A. Yes, sir.

Q. It was within his power at eight thirty-five, after Mr. Schwartz had been arrested and handcuffed, to take him to a United States Magistrate at that point, correct?

A. Not entirely. He has a supervisor he also is responsible to, who would make decisions in this area. This would not have been a normal practice to take him directly to the Magistrate. I assume he could have been superseded.

Q. There is an FBI Office in Manhattan?

A. Yes, sir.

Q. That is at Foley Square, isn't it?

A. No, sir, that is on 69th Street.

Q. 69th Street. And he could have been taken there, couldn't he?

A. Yes, sir.

MR. KREMER: Thank you, sir.

MR. HOULIHAN: No questions.

MR. MOREHOUSE: I have no further questions.

THE COURT: You have no questions, Mr. Colicchio?

MR. COLICCHIO: No.

THE COURT: Thank you, sir.

(Witness excused.)

* * * * * *

SUPPRESSION HEARING TESTIMONY OF GERHARD J. SCHWARTZ, dated 2-8-77.

GERHARD JULIUS SCHWARTZ, called as a witness on his own behalf, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MOREHOUSE:

Q. Mr. Schwartz, please state your full name?

A. Gerhard Julius Schwartz.

Q. Are you the defendant in this action brought by the United States of America, Number 76-131, charging you with the commission of the crime of bank robbery?

A. Yes, sir.

Q. Mr. Schwartz, you have heard a great deal of testimony here today, late today, concerning the execution of a document by you?

A. Yes.

Q. You have to answer, you can't --

A. Yes.

Q. You had conversations with FBI men who arrested you in New York City?

A. Yes, sir.

Q. Just tell the Court the subject of the conversations, tell who said what in substance to you concerning an inquiry of yours. That is all we are going to hear.

A. I was --

THE COURT: And when and where.

BY MR. MOREHOUSE:

Q. When you were arrested on November 22nd.

A. From the very first moment or --

Q. Start right out.

THE COURT: Whenever they first talked with you when you wanted to talk about the Rule 20, and the giving of statements. You were arrested at a certain hour?

THE WITNESS: Yes, sir, your Honor.

THE COURT: When after that did anything first happen, and tell us about that, and tell us when and where you were.

THE WITNESS: Well, it was at the FBI Office in New Rochelle. Like the agents said, maybe about -- it was right after they were good enough to let me speak to my wife on the phone, it was right after that. Now, I don't recall exactly who it was, Mr. Martineau or Mr. Berry asked me how I felt about going back to Rochester, and I said, "Well, if there was a way, I would like to have my case heard here." I wasn't fully aware of what the whole text of Rule 20 consisted of.

THE COURT: You probably never heard that?

THE WITNESS: Not until Mr. Morehouse explained it. I had no intention to cop out to it. I wanted to have the case heard away from Rochester. He told me that it wouldn't be no problem whatsoever having it heard in New York, because a lot of --

THE COURT: Mr. Berry told you this?

THE WITNESS: Yes. He said in order to stay down in New York City on the Rule 20, they would have to have a statement, and the statement I gave, which has been presented in evidence, has been carefully directed more or less along the lines that he wanted me to say it in.

THE COURT: All right.

BY MR. MOREHOUSE:

Q. In conclusion, this statement was given in consideration for bringing yourself under Rule 20, to continue proceedings in the Southern District of New York instead of Rochester?

A. That is right.

MR. MOREHOUSE: You may examine, sir.

CROSS EXAMINATION BY MR. HOULIHAN:

Q. Did you hear the testimony, Mr. Schwartz, that Agent Berry gave?

A. Yes, most of it.

Q. It is a fact, is it not, that when he was talking with you he told you you could plead guilty under Rule 20?

A. No, no, no, I never had it in mind to plead guilty to it. The whole thing wasn't elaborated on like it has been elaborated on here. I had the understanding in my mind -- all that was told to me was I could stay in New York on the Rule 20, that my case would be heard in New York.

Q. It was your understanding that if you gave a full, signed confession that you would go to trial down there?

A. Yes.

Q. The confession would be used against you at the trial?

A. I was more or less -- when it did come to trial I could tell everything in there that wasn't true. When the FBI had me, I was faced -- what I was faced with the day they broke in my apartment -- I was as glad to get rid of them as anybody.

Q. Mr. Schwartz, is this the first time you've ever been arrested?

A. I don't see what that has got to do with this.

THE COURT: Answer the question.

THE WITNESS: Yes, sir.

BY MR. HOULIHAN:

Q. It was the first time?

A. No, no, not the first time.

Q. How many times have you been arrested before?

A. Three, I believe.

Q. Three times?

A. Yes.

Q. Have you served any jail term?

A. Yes.

MR. HOULIHAN: I have no further questions.

MR. MOREHOUSE: No redirect.

MR. KREMER: Does the defendant Lord have any standing in this procedure?

THE COURT: I think so, as long as it is not lengthy.

MR. HOULIHAN: I would like it, if they are going to have the opportunity to cross examine this defendant, that it may be counted against them in terms of the admissibility of the statements. I can state for the record that I don't know what the case law is on that. I would like to --

THE COURT: It is noted on the record.

MR. KREMER: I would like a ruling from the Court prior to examination.

THE COURT: He hasn't asked for a ruling.

MR. KREMER: I would ask for one, your Honor. Do you want the Federal Rules of Evidence?

THE COURT: I would not make a ruling until on trial we face the same situation, and I would think that what happens in this suppression hearing, as far as admissibility or cross examination or availability for cross examination, that it doesn't mean anything, as far as the admissibility on trial.

MR. HOULIHAN: Your Honor --

THE COURT: But I don't want any lengthy fishing expedition or lengthy cross examination of Mr. Schwartz. I want to limit you more or less to what he has been talking about, in other words, the basic admissibility of these statements. When we get to the admissibility of those statements which might involve Mr. Lord, then, of course, Mr. Schwartz would have to have taken the stand in the courtroom and been subject to cross examination by you, as Mr. Lord's attorney, in the courtroom with the jury present. We are not going to have any examination before trial of Mr. Schwartz at this time in preparation for any such cross examination.

MR. KREMER: May I have a moment, your Honor? Excuse me a moment.

THE COURT: Yes.

MR. KREMER: Thank you, your Honor. At this time in view of the limitation which has been placed on the defendant, the defendant elects not to cross examine this witness.

THE COURT: What he says is the best you can get out of it anyway, as far as the general admissibility.

MR. KREMER: That is correct.

THE COURT: The same with you, Mr. Colicchio?

MR. COLICCHIO: I am not answering any questions at this point in time.

THE COURT: All right. Do you have anything further, Mr. Morehouse?

MR. MOREHOUSE: No, your Honor.

THE COURT: All right. Thank you.

(Witness excused.)

THE COURT: All right. In the morning, first thing, I will find out your position on the remaining portions of Government's Exhibit 10.

MR. MOREHOUSE: The four pages.

THE COURT: The four pages. I assume I can have those other documents now, may I?

MR. HOULIHAN: Yes, I will go in and make the copies.

THE COURT: 6, 8 and 9, I don't need 10, that is the one you are making the copy of. 6, 8 and 9 is what I would need.

MR. HOULIHAN: You don't need 10, the oral statements?

* * * * * *

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TRANSCRIPT OF PROCEEDINGS RE: SUPPRESSION HEARING FINDINGS, dated 2-9-77.

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 9:45 A.M.

(Defendants present, all counsel present with the exception of Mr. Morehouse, jury absent.)

THE COURT: Now, as we adjourned last evening at seven thirty following the suppression hearing, that hearing was completed except that Mr. Morehouse, representing Mr. Schwartz, had not theretofore had an opportunity to see the last four pages of what is marked and offered as Government's Exhibit 10, those being pages on which there are recitations of certain supposed oral statements made by the defendant Schwartz, and Mr. Morehouse was to let me know his position on that this morning. Where is Mr. Morehouse? I have more problems getting people in attendance.

(Thereupon Mr. Morehouse entered the courtroom at 9:50 A.M.)

MR. MOREHOUSE: May I approach the bench, your Honor.

(Thereupon an off the record discussion ensued at the bench.)

MR. MOREHOUSE: Thank you, Judge.

THE COURT: All set, Mr. Morehouse?

MR. MOREHOUSE: Thank you.

THE COURT: To repeat myself, in your absence, Mr. Morehouse, I had indicated that we had ended last evening at seven thirty after the taking of evidence in the suppression hearing, the hearing relative to the admissibility of a statement appegedly given by Mr. Schwartz on November 22, 1976, which is, for the purpose of the suppression hearing, Government's Exhibit 6, and, further, the admissibility of direct evidence as to certain oral statements purportedly made by Mr. Schwartz to agents of the FBI on that same date, which oral statements are set forth on the last four pages of what was in the hearing marked as Government's Exhibit 10. We have had colloquy in chambers and you indicated thereafter that examination of those last four pages of Government's Exhibit 10 that it was your position that you objected to it. Would you state that objection on the record, please? What is your position on Government's Exhibit 10?

MR. MOREHOUSE: May it please the Court, the defendant Schwartz respectfully urges the exhibits are not admissible. My position is the proper foundation has not been laid, the authenticity of the statement has not been established, there has been no truth so far educed that the actual words used by defendant Schwartz were properly transcribed on the last four pages. It seems to me to be a self-serving declaration.

THE COURT: We are talking about Government's Exhibit 10 itself which, of course, is a so-called Form 302 used by the FBI on which they, first of all, on the earlier pages incorporated the directed version of what was Government's Exhibit 6, the written statement allegedly made by your client, and on the last page is indicated a report of what he supposedly said to different agents about different things.

MR. MOREHOUSE: Correct.

THE COURT: The 302 itself, that document, we are not talking really about the admissibility of that because I can see no circumstances or rare circumstances when that document would actually come into evidence in the trial and be before the jury. What we are talking about is direct evidence by persons who were present when such and such statements were made along the lines of those reported on those last pages of Government's Exhibit 10, and I take it that your position as to that direct evidence of those statements is the same may be generally admissible in the case, you also are objecting to that?

MR. MORKHOUSE: That is correct, your Honor.

THE COURT: All right. Government's Exhibit 10 -- of course, I wanted to know your position -- as received and examined by me in another form, being the same document or counterpart of the same document as was given to Mr. Kremer, responding to his request for discovery, and I have examined it for the purposes of the suppression hearing, just as I have also examined Government's Exhibit 9, which is the so-called running log, and I have looked at Government's Exhibit 8, which is the photograph of Special Agent Martineau, and I have looked also at Government's Exhibit 6, which is the alleged written statement of defendant Schwartz, all for the purpose of the suppression hearing. Noting your objection to Government's Exhibit 7, I already ruled that that had no weight or bearing and was really not even considered by me or looked at by me in the suppression hearing, so that is out of the picture. On the basis of what I have, and getting down to the gist of the matter, namely, the competency of the basic admissibility of Mr. Schwartz's written statement, Government's Exhibit 6, to the extent that during the trial it becomes material and in a position where the prejudice attendant upon the admission of different parts of it is outweighed by its probity in the case, I deem it to be admissible, I so rule. Mr. Houlihan is in the process of structuring that statement in certain form. As you know, there are six separate statements made in the one running statement which comprises Government's Exhibit 6, and that is faced or has a lead sheet, which is the Advice of Rights Form, Form 395, as I remember it, and he is making up six sets, each of which will have the face sheet, and one will have a particular statement in there, another will have another statement, and we get the six statements standing individually and being able to be dealt with individually on the trial. All of them are competent, all are admissible.

Whether or not they will be admitted will depend on what is present in the trial. Without enumerating various things there, we know that two of the statements concern the bank robbery. One of those inculpates only Mr. Schwartz. There is no question in my mind now, and I will make a ruling as we come up to it during the trial, that that would be admissible. Another concerns the bank robbery and inculpates Mr. Schwartz and Mr. Lord and Mr. Yagy. That, while it is competent and properly authenticated and could be admitted under proper circumstances, I would have to see those circumstances before it actually will be admitted. Another pair of statements concern another robbery, and at this point I can't see that anything about that other robbery should come into the case. Maybe that will change during the trial, I will make that decision as we go along, if it is competent, properly authenticated, if it comes to a point of having probity to the point of overriding prejudice in the trial. The third pair concerns the alleged stabbing or assault upon a particular individual, and again we

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will see whether or not the circumstances during the trial will make one or more of those statements admissible if they are competent, properly authenticated, and able to be admitted, if they become sufficiently probative to the disposition of the trial or in the trial to the point where they can override the inherent prejudice against the defendants that are in those statements. As far as the oral statements that are reflected in the last pages of Government's Exhibit 10, if any direct testimony about those events would be similarly competent, subject to the same ruling I have talked about as to the inculpation of other people dealing with another robbery and dealing with this assault.

MR. MOREHOUSE: Your Honor, as to the issue of admissibility of exhibits, the applicable federal rule of procedure requires defendants who are arrested by federal agents to be brought promptly --

THE COURT: You [illegible] of that, and I'm happy you did. We had testimony during the hearing that Mr. Schwartz was apprehended sometime prior to nine o'clock, he was arrested sometime prior to nine o'clock in the morning on November 22, 1976, and he was taken not to New York City or to a magistrate immediately, but after some thirty five or forty minutes in the apartment where he was arrested, he was taken in a Bureau car to the New Rochelle Office of the FBI and advised of his rights there. I see that was properly done, and he had certain processing, fingerprinting and an attempted photographing, and he was strip searched, then he was interviewed, and it was not until sometime in the afternoon that he was actually taken to New York City, taken first to the FBI Office there for photographing because the equipment in the New Rochelle Office hadn't carried out the job competently, and then seemingly went to the office of the United States Attorney in the Southern District of New York, in Manhattan, and was interviewed there, and then finally by a public defender, and then ultimately he came before the magistrate and was arraigned. I certainly don't want to say that that delay is approved by me; in fact, I think it is to some degree reprehensible, but it is not reprehensible to the point where the courts in our circuit, at least as as of this point, have said that if this activity goes on, given the circumstances here where Mr. Schwartz was in control of his facilities, was not ill, was not under the influence of alcohol or drugs, read the adive of rights and waiver and signed the waiver, having been earlier advised of the same thing, I find that under those circumstances there is nothing that would keep those statements out of the trial record, if they are otherwise admissible.

MR. MOREHOUSE: I respectfully except.

THE COURT: In that connection, I must say that I have caused to be marked as Court Exhibit A the proposed order to show cause that you sent to mr, Mr. Morehouse, and attached to that is the affidavit made by Mr. Schwartz, verified or sworn to before you on January 26, 1977, and in there, of course, he is indicating that certain statements were made to an agent, whom Mr. Schwartz recalled to have been a slender person with a slender face. He took the stand and testified that it was Mr. Berry who supposedly gave him this information concerning Rule 20 and the need to make a statement, a written statement, before that could be dealt with, before he could have any chance at disposing of the matter in New York City. I find his testimony to be not correct, to be incredible in that regard. I also find it to be incredible, as far as his statement that he was divulging everything, as he did in Government's Exhibit 6, planning to have the disposition of his case in the Southern District of New York by way of a trial, at which trial he would take the state and refute the statements given by him. I find that to be incredible.

MR. MOREHOUSE: The defendant Schwartz respectfully excepts to the ruling by the learned Court, and renews the exception to the ruling of the Court pertaining to the admissibility of documents in violation of the Federal Rules of Practice.

MR. COLICCHIO: If the Court please, on behalf of the defendant Yagy, regarding the statements given by the defendant Schwartz, I know the Court has made its ruling, but I wish to point out to the Court that under Rule 9 of the Federal Rules of Criminal Procedure, more particularly, Rule 9(c)(1), when a defendant is arrested on a warrant upon indictment, the statute specifically requires, "The officer executing the warrant shall bring the arrested person promptly before the court or before a United States magistrate."

THE COURT: That is right, I am aware of that. As I say, I do not approve of the delay that occurred here and, as I say, I am not going to put my seal of approval on it. I think there should have been a more prompt taking of Mr. Schwartz before some judicial officer for arraignment, that was not done, but the judicial construction of "promptly", as used in that rule, has not been yet, to my knowledge, in this circuit, struck down this practice that attained here.

MR. COLICCHIO: I wish to point out, along the same argument, that the rules do make a distinction between a person who is arrested upon indictment and a person -- as compared to a person who is arrested upon a complaint, whereas in Rule 5(a) it says, "An officer making an arrest under a warrant issued upon a complaint or a person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate, or in the event a federal magistrate is not reasonably available, before a state or local judicial officer authorized under 18 U.S.C., 3041."

THE COURT: I am aware of that.

MR. COLICCHIO: There is a distinct provision, arrest upon indictment, it says "promptly." This would have avoided the occasion even to have the man waive his right to an attorney or to make any statements incriminating himself or others. I think --

THE COURT: I don't approve of this, particularly as I looked at the log, Government's Exhibit 9, I couldn't really understand why after all this is he brought into Foley Square in New York City. There was an occasion when he was taken into the United States Attorney's Office and there interviewed by an Assistant United States Attorney, all prior to arraignment. There was no offer of anything coming out of the interview. It is something I can't understand.

MR. HOULIHAN: Your Honor, may I clear that up for the record? For the purposes of that hearing I relied only on the proposed order to show cause that Mr. Morehouse submitted to the Court, and I was not aware prior to the hearing that we would get into the possibility of the delay. It is my understanding that the interview with the Assistant United States Attorney is a -- follows a particular format, asking the defendant if he understands his rights and asking him if he wants an attorney. Immediately when he says he wants an attorney --

THE COURT: It is more the job of a magistrate or judge, isn't it?

MR. HOULIHAN: I would presume that the magistrate would have that primary responsibility. I'm not aware of it, other than that information that I received, and that seems to be the practice down in the Southern District.

THE COURT: We are jousting with something I am not going to deal with. I merely mentioned that I couldn't understand why. I do not basically approve of the practice. I am ruling that Government's Exhibit 6, the written statements made by Mr. Schwartz, are per se admissible, depending upon the circumstances of proof in probity and prejudice during trial. The same thing concerning direct evidence of the supposed oral statements.

* * * * * * *

EXCERPT OF TESTIMONY OF SPECIAL AGENT CLINTON R. VAN ZANT, dated 2-10-77.

insurance premium notice, and the reserve account history with him?

THE COURT: I assume he may, if no counsel wants them here. We have the copies in evidence.

MR. KREMER: No objection.

MR. MOREHOUSE: No objection if the banker takes his papers back.

THE COURT: Very good, take them along.

(Witness excused.)

MR. HOULIHAN: The Government calls Clinton VanZant.

CLINTON R. VAN ZANT, 687 Regina Drive, Webster, New York, called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HOULIHAN:

Q. Mr. VanZant, you have previously testified in this case, and you are with the FBI, is that correct?

A. Yes, sir.

Q. And how long have you been with them?

A. Six years.

Q. And are you the case agent in connection with the bank robbery of Columbia?

Excerpt of Testimony of Special Agent Clinton R. Van Zant,
dated 2-10-77.

THE COURT: That is all repetitious. You were, right, you testified earlier that you were the case agent?

THE WITNESS: Yes, sir.

THE COURT: The case agent has administrative control of the case?

THE WITNESS: That is correct.

MR. HOULIHAN: Thank you, your Honor.

BY MR. HOULIHAN:

Q. Mr. VanZant, did there come a time in the course of your duties as a special agent that you had an opportunity to interview Gerald Joseph Yagy?

A. Yes, sir.

Q. And when was that?

A. On the date of his surrender at the FBI Office.

Q. Do you recall that date?

A. No, sir, I don't. If I can have the report of that interview —

Q. Showing you a 302, does that refresh your recollection?

A. Yes, sir. That was July 26, 1976.

Q. Now, on that date was Mr. Yagy alone?

A. No, he was in the company of his attorney.

Q. And what, if anything, did you ask him and what, if anything, did he tell you?

A. I asked him if he was knowledgeable of James Russell Lord, Jr., Gerhard Julius Schwartz and Ronald Hook.

Excerpt of Testimony of Special Agent Clinton R. Van Zant, dated 2-10-77.

MR. KREMER: Your Honor, I object to any statements as to my client, and ask for an instruction if they are not going to be stricken.

THE COURT: Yes. I assume we are not going to have a Bruton problem, Mr. Houlihan?

MR. HOULIHAN: No, your Honor.

BY MR. HOULIHAN:

Q. And what, if anything, did he say?

A. He indicated that he was knowledgeable of all three.

Q. Did you ask him any questions at that time concerning a bank robbery?

A. Yes. I did.

Q. And what, if anything, did you ask him?

A. I asked him if he was knowledgeable of the bank robbery of the Columbia Savings Bank, on April 9th --

THE COURT: What is this phrase "was knowledgeable"?

THE WITNESS: If he knew of anything concerning the bank robbery, concerning that specific bank robbery. I further asked him if he knew of the possibility of Mr. Schwartz, Mr. Lord, Mr. Hook and himself participating in the planning or carrying out of that bank robbery.

MR. MOREHOUSE: I object on the grounds that the defendant Schwartz wasn't present at the conversation. There was no evidence to that effect. It is certainly hearsay.

THE COURT: Limit your answers to involvement by the defendant Yagy.

BY MR. HOULIHAN:

Q. What did he tell you about his involvement?

A. He said that he was not involved, that he knew nothing of the bank robbery.

Q. At that time did he tell you what his date of birth was?

A. Yes, sir, he did.

Q. What was that?

A. I don't recall but it is reflected on my 302.

Q. Showing you again your 302, does that refresh your recollection?

A. Yes, sir. December 10, 1935.

Q. Thank you. Now, subsequent to the bank robbery on April 9, 1976, in the course of your duties as a special agent, did you have an opportunity to interview James Lord?

A. Yes, sir, I did.

Q. And when did that interview take place?

A. That took place approximately three o'clock on the afternoon of the bank robbery, April 9, 1976.

Q. And where did the interview take place?

A. The interview took place in Mr. Lord's apartment in Gates, New York.

Q. And about what time did you go to the apartment?

Excerpt of Testimony of Special Agent Clinton R. Van Zant, dated 2-10-77.

A. Approximately 3 P.M.

Q. Were you alone at the time?

A. No, I was accompanied by Special Agent Richard Foley.

Q. And when you arrived at Mr. Lord's residence was he alone?

A. No, sir, he was not.

Q. Who was there with him?

MR. KREMER: Objection, your Honor. The only answer is prejudicial to my client.

THE COURT: I don't know what the answer is. Who else was there?

MR. KREMER: Yes, your Honor.

MR. HOULIHAN: This may be of some assistance.

THE COURT: We will see.

MR. HOULIHAN: Your Honor, I call your attention to the second paragraph on the first page.

THE COURT: I have looked at that, it seems to be not at all pertinent, if that is what the answer would be, and possibly prejudicial.

MR. HOULIHAN: Your Honor, also the second paragraph, the second full paragraph of the second page, which I think should weigh on that.

THE COURT: Well, the matter in the second paragraph on the first page when tied in with what is in the second full paragraph on the second page is not prejudicial, and I will allow the answer.

I will allow such an answer.

MR. KREMER: Thank you, your Honor.

MR. COLICCHIO: Your Honor, on behalf of the defendant Yagy --

THE COURT: Obviously, anything that comes in of this nature is prejudicial, but its probity in the case overweighs the prejudice. Mr. Colicchio?

MR. COLICCHIO: Your Honor, on behalf of the defendant Yagy, we object to any commentary or statements made by the defendant Lord that may affect Mr. Yagy, on the grounds we were not there, they have not established Mr. Yagy's connection with any of the charges before this Court.

THE COURT: Well, this is true, ladies and gentlemen, but let's go along. I will give them instructions as the evidence is received.

MR. COLICCHIO: Thank you, your Honor.

BY MR. HOULIHAN:

Q. I believe the pending question is who is there when you arrived?

THE COURT: If anybody?

BY MR. HOULIHAN:

Q. If anybody?

A. There were two Rochester, New York police detectives there at the time of my arrival.

Q. And did there come a time that you interviewed Mr. Lord?

Excerpt of Testimony of Special Agent Clinton R. Van Zant,
dated 2-10-77.

A. Yes, sir, there did.

Q. Were the police detectives there at that time?

A. No, they exited the apartment within a few minutes of my arrival.

THE COURT: "Exited," you mean they left?

THE WITNESS: They left the apartment.

BY MR. HOULIHAN:

Q. And did you identify yourself to Mr. Lord?

A. Yes, by name and by display of my credentials as an FBI agent.

Q. Did you tell him the purpose of your visit?

A. Yes, sir, I did.

Q. And what did you tell him?

A. I told him that we were in the course of an investigation of a bank robbery that had taken place that morning at the Columbia Savings Bank.

Q. Did you then ask him any questions?

A. Yes, sir. I did.

Q. What did you ask him and what did he answer?

A. I asked him his whereabouts that morning April 9, 1976. His answer was that from approximately 8:30 A.M. until 10:30 A.M. he was visiting his mother who was then confined to, I believe, St. Mary's Hospital, Rochester.

Q. And did he tell you what room number?

A. I believe it was 307.

Excerpt of Testimony of Special Agent Clinton R. Van Zant, dated 2-10-77.

Q. Were there any other questions concerning his whereabouts?

A. I'm sorry.

Q. I again show you your 302, and ask you to refer to the third paragraph on the first page. Read that to yourself and see if that refreshes your recollection.

A. Yes, it does. He said that he had been in his mother's --

THE COURT: Don't read it.

THE WITNESS: He had been in his mother' hospital room between eight thirty and ten thirty, with the exception of a ten minute period when he exited his mother's room, went across the street to a doughnut shop, and immediately returned to her room again.

BY MR. HOULIHAN:

Q. Did there come a time that Mr. Lord left his apartment?

A. Yes, sir.

Q. And did you go with him?

A. Yes, sir, I did.

Q. Would you please tell the jury where you went?

A. During the course of our conversation with Mr. Lord, he indicated that he had to go to the laundry room, I believe to change clothes from the washer to the dryer or something of this nature. I asked if he would mind if I accompanied him, he said no. So he walked from his apartment down a flight of steps to the laundry room, and he did whatever he was going to do, still in my company, and then he walked back to his apartment again.

Q. Now, at the time that you walked down there with him and back up, were you ahead of him or behind him?

A. I was behind him.

Q. Now, when you arrived back at the apartment did Mr. Lord make a telephone call?

A. Yes, he did.

Q. And who did he call?

A. He indicated that he wanted to speak to his mother who was then confined to the hospital.

Q. Now, where was the phone in relationship to where you were standing?

A. It was a relatively small apartment, I was standing in the living room, the telephone I believe, was in the kitchen. He was on the telephone approximately a distance from yourself to me.

Q. Okay. You are talking about approximately ten feet?

A. Yes, approximately.

Q. And could you hear what he said on the telephone?

A. Very distinctly, every word.

Q. Would you tell us what he said on the telephone? Do you recall from your own recollection?

A. Yes, I do. I have the exact wordage in the 302, but I recall basically what he said.

Excerpt of Testimony of Special Agent Clinton R. Van Zant, dated 2-10-77.

THE COURT: Tell basically what he said. I take it you don't recall the exact words without looking at your 302?

THE WITNESS: Not the exact words, no, sir.

THE COURT: Give it to us the best you can.

THE WITNESS: He made the call. He said, "Mommy, this is Jimmy. Do you remember Detective Trotta of the police department? Well, he is here, and the FBI are here also. They think I robbed a bank this morning, but I told them I couldn't have robbed the bank because I was with you, visiting this morning," and he said, "The police will probably be down to see you soon."

BY MR. HOULIHAN:

Q. At the time he made that statement were you taking notes?

A. Yes, I was.

Q. Was there any further conversation at that time along those lines?

A. He continued to speak to his mother for approximately two more minutes, talking about how she felt, her physical condition, things such as this.

Q. Now, did there come a time during the course of the interview that you asked Mr. Lord to examine the contents of his wallet?

A. Yes, sir.

Excerpt of Testimony of Special Agent Clinton R. Van Zant, dated 2-10-77.

Q. What, if anything, happened at that time?

A. He removed his wallet from his pants, opened it up. I asked him what the content of the currency in his wallet was. He leafed through the currency, which he revealed to me to be basically fifty and one hundred dollar bills, and numerous other denominations. I asked him how much was there, and after counting, he said, "One thousand three hundred dollars."

Q. He said fifty one hundred dollar bills or fifty and one hundred dollar bills?

A. Fifty and one hundred dollar bills, denominations of fifty and one hundreds.

Q. Now, did you have any further conversation with him at th time concerning his occupation?

A. Yes, sir, I did.

Q. What, if anything, did he tell you?

A. I asked him where he was currently employed. He said that he had been working for the Taylor Instrument Company but that he had a heart condition that would not allow him to work recently, and he also said he recently had problems with one of his feet.

Q. Did he tell you how long he had been unable to work?

A. He indicated a number of months. I don't believe he said specifically how many months.

Q. Now, during the course of the interview you had an opportunity to observe him, obviously, going down to the laundry room and back up, and you already testified as to that. Did you observe him at any other time?

A. I observed him all the time he was in the apartment. I don't believe he was ever seated in the apartment, the three of us were on our feet, walking around the apartment and talking together.

Q. And what, if anything, did you notice about the way he walked?

A. I noticed nothing unusual whatsoever in his walk, neither in the apartment or when he descended the steps to go to the laundry room and return.

Q. Did there come a time that Mr. Lord gave you a physical description of himself?

A. Yes, sir.

Q. Was that at the same time?

A. Yes, sir.

Q. Please tell me what he told you?

A. By "the same time" you mean in this interview at his apartment?

Q. Yes.

A. At that time he did not give me any specific physical description of himself.

Q. Did you get a physical description from him some time later?

Excerpt of Testimony of Special Agent Clinton R. Van Zant, dated 2-10-77.

A. Yes, I did.

Q. And was that the same day?

A. Yes, it was the same day, during the course of a separate interview.

Q. And what did he tell you?

A. I believe he indicated that he was approximately five foot elevan, two hundred twn pounds.

Q. Did you make any observation as to his build?

A. Yes, sir. From my observation I found he was a heavy, stocky build.

MR. HOULIHAN: That is all I have at this time.

THE COURT: We will take a ten minute recess, ladies and gentlemen.

(Thereupon the court was in recess at 10:30 A.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 10:50 A.M.

(Defendants present, counsel present, jury present.)

CLINTON R. VAN ZANT, called as a witness on behalf of the Government and having been previously duly sworn, resumed and testified further as follows:

* * * * * *

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TRANSCRIPT OF PROCEEDINGS AND EXCERPTS OF TESTIMONY OF RONALD HOOK AND TESTIMONY OF AMERICA DeCASTRO, dated 2-10-77.

THE COURT: I have an indication that your next witness is Mr. Hook?

MR. HOULIHAN: I have another witness that would be short, but she is not available until twelve thirty, and Mr. Hook will be quite lengthy, and I don't know where he is.

THE COURT: He is coming into the building now.

MR. HOULIHAN: I haven't had an opportunity to talk to him, your Honor, concerning your rulings this morning, and I also haven't been given an opportunity to argue that for the purposes of permitting the testimony. Also --

THE COURT: Well, you will want, of course, to convey to him -- the reason I sent the jury out was that I want to bring him in and also give him some admonishment about listening to questions and answering just the questions, so that we don't get any volunteering of items that should not come into the case, so that we run a tight ship and there will be opportunity for defense counsel to object to the question before the answer is given, that type of thing. Now, I will listen to any argument you have on it, although at a sidebar conference I indicated to you initially that I wanted Mr. Hook to say nothing in his direct examination about the other robbery, and initially I said that I wanted him to say nothing about the stabbing. You indicated the, after some colloquy with the other counsel, that the testimony that he would give concerning the stabbing would be limited, as far as motivation and connection, to the bank robbery.

MR. HOULIHAN: Yes.

THE COURT: I told you at that point that that probably would be all right, but I warned you that you were running a risk that something might come out and we might have a mistrial of the case. Now, those are still the ground rules here. You have to decide what you do relative to a risk of a mistrial, and you also have to decide what you do as far as the risk of a reversal if there is a conviction. That I leave with you. There are great dangers, in my mind, on both points.

MR. HOULIHAN: Your Honor, I understand the constraints and the risks, and that is why I did not want to put Mr. Hook on until one o'clock, so at least I could have time to --

THE COURT: You have had plenty of time to talk with him

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about it generally. It had been anticipated that he would be on the stand before this.

MR. HOULIHAN: Absolutely true, your Honor.

THE COURT: You may go and talk with him at this point concerning this later development, and then we will bring him in the courtroom and I will give him the admonishment I have talked about, and we will bring the jury back and commence his examination.

MR. HOULIHAN: Your Honor also indicated on your ruling with regard to Government's Exhibit 2 and with regard to the testimony of Mr. Kszystyniak that I may be heard on those two issues.

THE COURT: Yes. What is there in Government's Exhibit 2 that you would think would be needed in the case at this juncture? You've got nine photographs comprising your Exhibit 3 and Exhibit 4, which has been testified are blowups of frames of the movie film taken by the surveillance camera, which is Government's Exhibit 2 -- the film, rather, being Government's Exhibit 2. Those show two individuals in a bank, and, of course, that has been testified to be the bank in question and the event in question. They are action photographs, to the extent that a still photograph can be one, but action fairly springs out of the pictures as you look at them. It seems you could see the shotgun, you can see the coveralls, you can see the masks, you can see people crouching down near or on the floor, you can see a bag or bags in the individuals' hands. What more do you have in the film?

MR. HOULIHAN: The photographs that are in evidence, Government's Exhibits 3 and 4, represent only nine frames of a film that runs approximately three minutes. In addition, we have noticed from Mr. Kremer that part of his defense is going to be the inability of Mr. Lord to move on that day. In addition, we have some substantial cross examination of each of the tellers --

THE COURT: The film doesn't show Mr. Lord moving.

MR. HOULIHAN: Yes, it does.

THE COURT: It shows an individual moving.

MR. HOULIHAN: An individual moving.

MR. KREMER: It is a series of stills, your Honor, in any event, it is not a motion picture in the sense that I see a movie, is is --

THE COURT: I was wondering about that, too. Are they sequential shots or are they actually --

MR. HOULIHAN: It is a motion picture, a sixteen millimeter motion picture, it looks like a movie to me.

THE COURT: Just like a movie?

MR. HOULIHAN: Yes.

MR. KREMER: My apologies on that point.

THE COURT: Of course, any movie is a series of still pictures, it is the closeness of the sequence that makes it one or the other. Now, what is in there? As I say, it shows a man -- it shows two men in there. As you look at the nine photographs, they are obviously moving, but who knows which one or either one or if it is Mr. Lord at this point?

MR. HOULIHAN: At this time we don't. The witness Hook will identify who went into the bank, and the manner of the people that moved in the bank becomes then important.

THE COURT: You want to prove that Lord was lying or covering something up when he said he had a sore foot. You have had VanZant who said he seemed to walk quite regularly.

MR. HOULIHAN: Well, it is my understanding that the ruling is based on cumulative evidence?

THE COURT: Cumulative, yes. We are moving too slowly in the case already.

MR. HOULIHAN: Well, I understand that, your Honor, but there were three hearings requested by the defendant that could have been requested at --

THE COURT: I am not blaming anyone for it. Talk with Mr. Hook.

MR. HOULIHAN: One more matter in connection with the testimony of Mr. Kszystyniak, we had Mr. Wakefield's testimony that he did identify two photographs --

THE COURT: I understand the whole thing, and I have considered it to be a matter of my discretion in the control of the case, and I have decided not to admit it.

MR. HOULIHAN: All right. May I say for the record that Rule 801(d)(1)(c) covers this particular circumstance, and the case is cited by defense counsel talk about --

THE COURT: As I understand the Federal Rules of Evidence, they dictate what is competent evidence. It doesn't say that everything that is talked about must be received at a trial. It is in that area that I feel myself as having discretion, which I exercise in keeping it out.

MR. HOULIHAN: The only matter then, your Honor, is that Mr. Wakefield is left with -- there is a hole in the testimony with regard to --

THE COURT: A positive identification?

MR. HOULIHAN: No, an identification of two photographs, and the jury doesn't know what he identified. I don't want to be held responsible for having to produce a witness and failing to produce that witness. If I recall, Mr. Morehouse questioned the jury on it in his voir dire. Other than that, if the Court will —

THE COURT: He made an in court positive identification of Mr. Schwartz, there wasn't any question about that. He thought Mr. Lord was the Jimmy who was at the house with Mr. Schwartz, said he was not positive that was so. That is the way it is left.

MR. HOULIHAN: Well, am I to understand that there will not be a charge that I failed to produce a witness on that issue?

THE COURT: Of course not. Of course there will not be any such instruction on this point.

MR. KREMER: I didn't think there would be.

THE COURT: Do you want to go talk with him?

MR. KREMER: Off the record.

THE COURT: Yes.

(Thereupon an off the record discussion ensued.)

(Thereupon the court was in recess at 11:30 A.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 11:40 A.M.

(Defendants present, counsel present, jury absent.)

MR. HOULIHAN: Your Honor, there is a portion of the testimony of Mr. Hook that refers to a Wegman robbery. It is not the Wegman robbery that we are concerned about in this case. There will be testimony concerning a statement by Mr. Lord that they were going to rob the bank the week before but because of a robbery of the Wegman's Market next door they did not do it. This is in corroboration of the statement of Mr. Wakefield. I have instructed him not to mention anything about that.

MR. KREMER: Your Honor, with respect to Mr. Wakefield, you excluded it then, and I ask it be excluded now. That is offered for the prejudicial value, not for the probative value.

THE COURT: I don't remember doing that, Mr. Kremer.

MR. KREMER: When Wakefield testified, your Honor.

THE COURT: Wait a minute, he testified twice. Let's see --

I remember now, Mr. Houlihan was offering to show something concerning that other robbery as a means of pinning down for Mr. Wakefield the date of the visit by Mr. Schwartz and Jimmy, and I precluded him from going into it because I didn't want to spend that much time on that type of an operation in this trial and, as a matter of fact, I was suggesting that a very simple way would have been to produce the receipt from the materials company, which would have shown the date of March 31st.

MR. KREMER: Except that I would then -- I would move that it not be permitted in this case because it shows a general criminal disposition on the part of my client. Its prejudicial value outweighs the --

THE COURT: Not that there was a robbery of Wegman's on the earlier day, it shows nothing of that kind. What it shows is that they on the earlier date -- this is Mr. Hook's testimony -- on the earlier date had planned to carry out a robbery. Now, that really doesn't show any continuing or great criminal characteristic or tendency on the part of anybody. We are still talking about a single event. The only thing that is going to happen, Hook would say that because of something it didn't happen then and it happened, he says, on a later date, a single event. It is not a robbery, even, which would show a criminal tendency.

MR. KREMER: Again, your Honor, if your Honor is going to let that in, I will take exception to that.

THE COURT: I will let it in.

MR. COLICCHIO: Objection, your Honor, on behalf of the defendant Yagy, as we have objected yesterday, to any testimony regarding the defendant Lord or Schwartz and some attempted robbery in the early part of April, on the grounds we have not established Mr. Yagy's participation in the conspiracy or that there is a conspiracy.

THE COURT: I anticipate Mr. Houlihan will be reaching that, trying to reach it very shortly.

MR. COLICCHIO: I think yesterday you said you were going to provide restrictive instructions to the jury.

MR. MOREHOUSE: Schwartz position is that it is all immaterial and irrevelant, just cheap talk.

MR. COLICCHIO: I note my objection.

THE COURT: Bring Mr. Hook in.

MR. HOULIHAN: I have a nurse who has to be to work at three o'clock. I wonder if at one o'clock we could put her on?

THE COURT: All right.

(Thereupon Ronald Hook entered the courtroom.)

THE COURT: Mr. Hook, we are at a point where you are going to be resworn as a witness in the case. This time, of course, the jury will be here in the courtroom. You have talked with Mr. Houlihan just very recently about what I have said about how I want the case to be run. I know, of course, that you have at least knowledge of three separate things, and maybe others. We are trying a case here involving an alleged bank robbery, that is one thing. There was also in the picture something about a robbery of a Wegman's supermarket and then, of course, there was the very bad thing that befell you, namely, the stabbing of you. Now, Mr. Houlihan is going to ask questions. Listen to those questions. Don't blurt out any answer, because some one or other of the defense attorneys may have an objection, and I want to deal with those objections before you answer, and then as you answer, just answer the question, don't get into any side closet or anything. Do you understand that?

MR. HOOK: Yes.

THE COURT: In other words, if he asks you about the stabbing, you can answer about the stabbing. If he doesn't ask about it, don't say anything about it. This is on direct examination. Of course, when you come to cross examination, again make sure you understand the question, don't take advantage of the situation again, and sometimes it can be done when a defense counsel asks a question, maybe it gives you a chance to throw everything into the case. Again, don't do it.

MR. HOOK: Yes, sir, I will try not to.

THE COURT: You take a chair, we will bring the jury in.

MR. KREMER: Can we have the Brady and Jencks material now?

THE COURT: You are not entitled to it until he has testified. I assume you can have it at lunch. If you get it ahead of time, it is up to Mr. Houlihan.

(Jury present at 11:50 A.M.)

MR. HOULIHAN: The Government calls Ronald Hook.

RONALD HOOK, called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HOULIHAN:

Q. And now, Mr. Hook, are you a native of Rochester?

A. Yes, sir, I am.

Q. And where did you go to grade school?

A. Sacred Heart.

Q. Sacred Heart in Rochester?

A. Yes, that is on Raynes Park.

Q. And did you go to high school?

A. Yes, sir.

Q. What high school?

A. John Marshall High School.

Q. And how many years in high school had you completed?

A. I dropped out during my second year.

Q. What year was that?

A. 1975.

Q. And how were your grades during that period of time?

A. Average.

Q. And did you have any suspensions at all while you were at John Marshall?

A. No, sir.

Q. Do you have any criminal record at all?

A. No, sir.

Q. Now, at the time that you were in high school did you have a part time job?

A. Yes, sir, I did. I worked at Columbo's Minute Man, corner of Ridgeway and Dewey Avenue.

Q. And when did you start working there?

A. I worked there two and a half years prior to quitting school.

Q. How old were you when you started?

A. Fourteen, about fourteen years old.

Q. Now, after you quit school did you have a full time job?

A. Yes, sir, I did.

Q. Where did you work?

A. The same place, Columbo's Minute Man.

Q. And how long did you work for Columbo's Minute Man?

A. Approximately three years.

Q. Full time?

A. Yes.

Q. Does that include the part time while you were in school and the full time after school?

A. Yes.

Q. And did you quit that job?

A. No, sir. Mr. Columbo went out of business, I was forced to leave.

Q. During the course of your working full time at the gas station, were you left alone to operate the gas station at any time?

A. Yes, sir.

Q. And --

A. Many times.

Q. Did you have responsibility over the money in the gas station?

A. Yes, sir.

Q. Were there any losses during the period of time you were there?

A. No, sir.

Q. Did you have an agreement with your boss regarding any losses?

A. Yes, any losses would be made up by myself.

MR. KREMER: Your Honor, I object to the relevance of all this.

THE COURT: Sustained.

BY MR. HOULIHAN:

Q. Where was this gas station that you worked at?

A. The corner of Ridgeway and Dewey Avenue.

Q. Is there a pizzeria near there?

A. Yes, sir, almost directly across the street.

Q. Now, subsequent to the time that the gas station went out of business, did you get another job?

A. Yes, sir. A man named Gerald Yagy asked me if I would like to work around the store, deliver pizzas, pick up extra money. It was during my job at Columbo's Minute Ma and at first I didn't want to, and finally I agreed. Later the station went out of business, and I was just working there --

THE COURT: Wait for a question.

BY MR. HOULIHAN:

Q. Now, what was the name of this pizzeria?

A. Macaluso's.

Q. Do you know who owned it?

A. I believe that the store was in Mr. Yagy's mother's name, he ran the store.

Q. How long did you know Mr. Yagy?

A. I know Mr. Yagy about three years. As far as associating with him --

MR. KREMER: Objection, your Honor. The question was how long did you know Mr. Yagy, and the answer was three years.

THE COURT: Yes, sustained. The jury will ignore the rest of it.

BY MR. HOULIHAN:

Q. Would you please tell the Court and the Jury how well you knew Mr. Yagy?

A. I didn't know Mr. Yagy very well until approximately one year ago, January or February of 1976, when I started to work in the store.

MR. KREMER: Objection, your Honor.

THE COURT: Just tell the nature of your relationship. There came a time when the relationship changed, and prior to a year ago you knew him on one basis, and after that time you knew him differently?

THE WITNESS: Yes.

THE COURT: Tell the jury briefly what those two were. Prior to a year ago how well did you know him?

THE WITNESS: Not too well.

THE COURT: What does that mean?

THE WITNESS: Well --

THE COURT: How often did you see him?

THE WITNESS: Not very often. I was a customer in the store every now and then. As far as --

THE COURT: Once a month?

THE WITNESS: Once a week.

THE COURT: All right. Now, at about a year ago that situation changed, from and after that time how well did you know him?

THE WITNESS: I knew him -- I knew more about him. I mean --

THE COURT: Not what you knew about him.

THE WITNESS: I'm sorry.

THE COURT: Did you have a certain relationship, were you seeing him more often?

THE WITNESS: Yes, seeing him more often.

THE COURT: Did you see him socially?

THE WITNESS: Yes, sir.

THE COURT: Did you see him in a business way?

THE WITNESS: Yes.

THE COURT: All right, go ahead.

BY MR. HOULIHAN:

Q. Now, when you saw him socially what, if anything, would you do?

A. He would take me to various gambling halls in the city, and the money I made with him in the store he would take and put --

MR. KREMER: Objection. The question was where he went.

THE COURT: Yes, sustained. Answer the questions.

BY MR. HOULIHAN:

Q. And you say that you went to certain gambling halls?

A. Yes, sir.

Q. And what did you do at the gambling halls?

A. We gambled. He did the actual gambling, I was more or less a partner with him, he held my money.

Q. What was your -- did you have any agreement as to your partnership?

A. Yes.

Q. That wasn't a written agreement?

A. No, nothing like that.

Q. What was that agreement?

A. Everything would be -- whatever money he gambled half of it would be mine, and whatever he won, half of it would be mine.

Q. Now, the places you went with Mr. Yagy, do you remember the name of them?

A. Yes, I do.

Q. Would you tell us what the names were?

A. Lake Avenue, the name was 44 Club. There was a place on East Main Street, West Side Bowling Social Club. A place on Thurston Road, upstairs apartment, I had no name.

Q. How often did you go to these places that you mentioned?

A. At first maybe once a week, and it got to where it was every night we would go.

Q. And you say you gambled, what kind of gambling did you do?

A. Card games going on there.

Q. Now, did you win or lose in these gambling experiences?

A. Well, sometimes we won, but the majority of the time we would lose.

Q. And was credit extended at all?

A. Mr. Yagy had all the credit, any borrowing done was done by him.

Q. Now, as part of your agreement you were responsible for at least half of any debt?

A. Yes. Like we would go in with a hundred dollars, let's say, and we lost the money, I would lose fifty, he would lose fifty, and maybe he borrowed some more, he would ask me if I wanted a chance to get the money back, and we would go further.

Q. Did there come a time that you jointly incurred a debt?

A. Yes, we incurred a debt approximately --

MR. KREMER: Your Honor, I don't wish to stifle the witness, but the question is did you incur a debt, the answer is yes.

THE WITNESS: Yes, we did.

BY MR. HOULIHAN:

Q. What was the amount of that debt?

A. Approximately $900.

Q. And you would be responsible for half of that?

A. Yes, sir.

Q. And Mr. Yagy would be responsible for the other half?

A. Yes.

Q. And did you have the money to pay your portion of that debt?

A. No, sir.

Q. Approximately when was this in time?

A. Approximately April 4, 5 --

THE COURT: What year?

THE WITNESS: 1976.

BY MR. HOULIHAN:

Q. To your knowledge, did Mr. Yagy have money to pay his debt?

A. No, sir.

Q. I direct your attention now to the date of April 5th and 6th, did there come a time that you had a conversation with Mr. Yagy?

THE COURT: This seems to be an appropriate time to break, is it?

MR. HOULIHAN: That would be fine, your Honor.

THE COURT: In the course of your examination is this a good point?

MR. HOULIHAN: Yes, your Honor.

THE COURT: All right. We will take our noon recess at this time, ladies and gentlemen. Come back at one o'clock, and remember my admonition, do not talk about the issues of the case yet, keep your mind open, do not talk with anybody else, and come back at one o'clock.

(Thereupon the court was in recess at 12:04 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 1:15 P.M.

(Defendants present, counsel present, jury absent.)

THE COURT: You started one point, Mr. Houlihan, before the direct examination of Mr. Hook, I don't know whether it was on the record or not, but before he came in the room, to say something about something arising on cross examination of Mr. Hook, do you have that in mind? Well, if you don't, that is all right. I delayed taking it up at that time.

MR. HOULIHAN: I do recall what it is. The defense asked for the amount of money that had been paid to Mr. Hook by reason of his being in the Witness Protection Program, and the Marshal provided me with a printout. It shows subsistence payments and housing payments. I am not sure if there is going to be any limitation on the use of that. He did receive some $2,400 since he has been in protective custody, since the day he made his statements. That would open the door to asking him concerning what portion he received that he could use for his own spending money, and what portion was paid for housing.

THE COURT: I think that would be so.

MR. HOULIHAN: Your Honor, I do have a witness who has to be to work at three.

THE COURT: What is she going to testify about?

MR. HOULIHAN: Sh will --

THE COURT: We had a question when Mr. VanZant was on the stand about Mr. Hock's mental acuity --

MR. HOULIHAN: No, no.

THE COURT: Is this witness from that hospital?

MR. HOULIHAN: She is from St. Mary's Hospital. She will testify she was on the floor the morning of April 9th and in the room with Margaret Lord, the mother of Mr. Lord. It shouldn't be very lengthy, your Honor.

THE COURT: All right. When do you want to put her on?

MR. HOULIHAN: I would like to put her on now.

THE COURT: All right. Bring in the jury.

(Thereupon the jury entered the courtroom at 1:20 P.M.)

AMERICA DE CASTRO, 295 Bennett Road, Hilton, New York, called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HOULIHAN:

Q. Mrs. DeCastro, by whom are you employed?

THE COURT: Ladies and gentlemen, we are interrupting the testimony of the earlier witness to serve Mrs. DeCastro's convenience in getting back to her job. Go ahead.

BY MR. HOULIHAN:

Q. Mrs. DeCastro, by whom are you employed?

A. By the St. Mary's Hospital.

Q. How long have you worked for them?

A. Twelve years in August.

Q. What is your job there?

A. Nurse's assistant.

Q. And have you been a nurse's assistant all the time that you were there?

A. Yes, I have.

Q. And I direct your attention to the date of April 9, 1976, were you working at the hospital on that day?

A. Yes, I was.

Q. And what were your hours of employment that day?

A. Seven fifteen to four o'clock.

Q. And were you assigned to a particular floor on that day?

A. Yes, I was assigned to the third floor.

Q. And are there several wings on that floor?

A. Two they call A and B wing.

Q. Were you assigned to a particular wing?

A. Yes, I was assigned to -- I think it's B wing.

Q. B wing?

A. Yes.

Q. And on that day did you have responsibility for a Margaret Lord?

A. Yes.

Q. And do you recall what room number she was in?

A. I think it was in between C-309 or 307.

Q. Would you tell me, on the morning of April 9, 1976, about what time was breakfast?

A. Served quarter to eight to eight o'clock.

Q. And did you pass out the breakfasts at that time?

A. Yes, then we passed the linens around for the beds.

Q. Then you passed the linens around?

A. Yes.

Q. That is in addition to the breakfasts?

A. Yes.

Q. Did there come a time on that day when you were picking up the trays?

A. Right.

Q. And on April 9, 1976, did there come a time that you visited Mrs. Lord to attend her?

A. Right, we give her a bath. We decided to move the bed about eight thirty, nine o'clock when the doctor comes in. I went in to do the bed between nine o'clock, then a few minutes the doctor ordered some treatment.

Q. The doctor had to go in?

A. Yes, when the doctor come out I went up and finished up the bed.

Q. Did you give her a bath on that day?

A. Yes, I did.

Q. Approximately what time did you give her a bath?

A. Well, about nine thirty, ten o'clock, something like that.

Q. And how long does it take to give a bath?

A. Give a bath in the bed takes anything from fifteen minutes to half hour.

Q. What time do visiting hours start?

A. Eleven in the morning to eight at night.

Q. Are visitors allowed on the floor prior to eleven o'clock?

A. Only on the surgery day. On the surgery day they can go earlier.

Q. That means you are going into surgery?

A. Right.

Q. Now, was Mrs. Lord going into surgery on that day?

A. No, she was already to the surgery.

Q. Was she allowed visitors before eleven?

A. Not to my knowledge.

Q. And approximately how many times were you in and out of that room between the hours of eight thirty and ten thirty on that day?

A. Anything from two times or four times. I can't keep track of that. At least three times.

Q. At one time a physician was in there?

A. Right.

Q. And at any time during the period that you were in Mrs. Lord's room did she have a visitor?

A. No, she didn't.

Q. And if she had a visitor at that time, would that be allowed?

A. No, it wasn't, because we were getting the patient ready.

Q. What would you do if you saw a visitor?

A. I would tell them to step out, the visitor.

Q. Did there come a time in the afternoon that you were in Mrs. Lord's room?

A. Went over to see if the patient needed anything, something like that, I can't recall how many times.

Q. And while you were in the room did she receive a call?

A. The first phone call was in the morning, when I making the bed the phone rang. She said, "It would be my husband, answer it." I did, I said she was busy, she would call back.

Q. She said it was her husband?

A. Right, "It must be my husband, he is sick home, I call him, I will call back," when she had a chance.

Q. Was there another call in the afternoon?

A. In the afternoon I passed by in the hallway, there was a phone call.

Q. And do you know who was calling at that time?

A. No, I don't because she answered the phone at that time.

Q. Did she tell you who it was that called?

A. No, I just heard like, 'Jim, don't worry about it,' that's all.

Q. I'm sorry, you heard --

A. 'Jim, don't worry about it.'

Q. Did there come a time that you were interviewed by members of the FBI?

A. Yes, I was.

Q. And how long after April 9th were you interviewed?

A. I can't remember if it was two days later or the next day.

MR. HOULIHAN: Thank you very much. No further questions.

CROSS EXAMINATION BY MR. KREMER:

Q. Good afternoon, Mrs. DeCastro.

A. Good afternoon.

Q. Mrs. DeCastro, you told us that you are a nurse's assistant, is that correct?

A. That's correct.

Q. And as a nurse's assistant you give people baths?

A. Right.

Q. And you change dressings?

A. Not I change dressings. I change beds.

Q. Just beds?

A. Right.

Q. A nurse actually takes charge of changing dressings and giving shots and things like that?

A. Right.

Q. Now, this third floor that you were working on, you said you were assigned to the B wing?

A. Right.

Q. You said there is an A wing as well?

A. Right.

Q. And have you worked the A wing?

A. Yes, I worked both.

Q. So some days you worked the A wing?

A. Right.

Q. Some days you work the B wing?

A. Right.

Q. And there is a schedule that is posted?

A. Yes, there is a schedule posted.

Q. Does it sometimes happen that you get pulled off the A wing and get told to work on the B wing?

A. Let me get it straight. To begin with, I usually work in the children's ward. That day I was assigned to the floor, they were busy, needed help.

Q. Is the children's ward in either the A or B wing on the third floor?

A. No, it is on the first floor.

Q. You basically are used to working with the young people?

A. Right.

Q. Teenagers -- younger?

A. Younger than teenagers.

Q. During the course of the years you must have seen a lot of youngsters and teenagers?

A. I still do, yes.

Q. And on this particular day, was this your first day, second day or third day working up on 3?

A. It was the first day on working there. Before I work all through hospital, but this day was --

Q. How many beds are there in the A wing?

A. Oh, I think there's about twenty six.

Q. But --

A. Twenty six rooms, but some of them are double rooms.

Q. I see. And on the B wing how many rooms are there?

A. I can't exactly recall, I'm sorry, I can't.

Q. That is fine. Thank you, ma'am. So that on B, you can't really recall how many rooms there are?

A. Right.

Q. Now, how many people were working with you on the B floor on that day?

A. Myself and one of the nurses, one what we call team leader, which is another nurse.

Q. You were responsible for bathing all of the people on B is that right?

A. With the help of the nurse.

Q. Right. Each of these people had to be bathed by you on that day?

A. Not all by myself, but some of them, they can do themselves, some of them, we help them.

Q. Do you recall how many people you bathed on that day?

A. No.

Q. You can't. Can you recollect how many beds you would have changed on that day?

A. I don't remember that either.

Q. And can you remember how many people were in the B ward on that particular day?

A. I think it was full, I can't recall.

Q. Okay. Now, you indicated that visiting hours were from eleven o'clock to eight o'clock?

A. Right.

Q. Now, before then there would be other people, before eleven o'clock there would be other people around the floors at all times, wouldn't there?

A. Like who, the nurses or the visitors?

Q. The nurses.

A. Yes.

Q. There would be doctors?

A. Doctors, nurses.

Q. There would be hospital administrators?

A. Right, housekeepers.

Q. And there would be other people, too, wouldn't there?

A. Right.

Q. So that a person could conceivably be walking in that hospital corridor who you wouldn't know, is that possible?

A. Yes, it could be possible, but to my knowledge, not that morning.

Q. Now, on each particular floor there would be certain people that would work on that particular floor, is that not correct?

A. Correct.

Q. And when you went to work on 3B didn't you meet some new faces for the first time?

A. No.

Q. They were all the same?

A. All faces the same.

Q. That was the people that worked on the floor?

A. Right.

Q. Now, with respect to the hospital administrators, you didn't know who was being hired and who was being fired at all times, did you?

A. I'm pretty sure that I know who they are.

Q. You know who the administrators are?

A. Yes.

Q. You know all the doctors?

A. Not all of the doctors, no. I know most of the doctors.

Q. Has it ever happened that a doctor has gone past you that you have never known?

A. Could be possible.

Q. Sure. Now, with reference to the day that you say you were working on the B floor, there wasn't anything that happened on that day that was unusual, was there?

A. No.

Q. There wasn't anything unusual about any of the patients, was there?

A. Not to my knowledge, no.

Q. And the first time that you became aware of the fact that someone was interested about April 9th was, as you say, a day, maybe two days later?

A. Correct. When I was examined by the FBI the very same day, April 9th, working down in my wing, one of the nurses called me.

Q. Excuse me, ma'am, please. Now, this FBI man came and talked to you, as you say, one or two days later?

A. Right.

Q. And he came in and told you that he wanted to talk to you about a particular patient, correct?

A. Right.

Q. And he mentioned that patient's name?

A. That's right.

Q. Now, you don't make notes, do you, as to when you bathe people?

A. No, I don't.

Q. And you don't make notes as to when you change the linens, do you?

A. We mark them down on the paper.

Q. But you wouldn't mark down that bed number whatever it is in room so and so was changed exactly at such and such a time?

A. No, I don't.

Q. And with respect to your schedule on floor 3B, you had no particular schedule of beds that you made one after another, did you?

A. No.

Q. And you would go from one place to another place?

A. Right.

Q. And that would depend upon whether a patient was sleeping or was available?

A. Right.

Q. About what time did you get to work that morning?

A. Well, I went, you know, about quarter after seven, something like that.

Q. And you didn't begin your tour of duty on that floor -- let me ask you the question differently. When you came in did you report to that floor first?

A. No, when I come I reported to my floor, the children's floor, that is where I usually work.

Q. From there you were directed to go to 3B?

A. Right. The nurse's service called and said they needed help upstairs, if I could go up, I did.

Q. Was it 3A when you went up?

A. When I went upstairs they sent me to one wing which was B wing, then I --

Q. Did you do any work on A that day?

A. No.

Q. Are you sure or just guessing?

A. I didn't go any work. If they needed help, we would help each other. I was with the B ward most of the time, I was in the B wing that morning.

Q. Did you get to the A wing that afternoon?

A. I don't think so.

Q. You don't think so?

A. Right.

Q. Did you get to the A wing the next day?

A. The next day I was working down in the children's ward again.

Q. And did you get up to 3A or 3B anytime later that week?

A. That I can't recall.

Q. I see. Do you remember how many other ladies that you bathed on that particular day?

A. No, I don't.

Q. Now, when you say that you gave her a bath about nine thirty, that is just your guess, isn't it?

A. Well, I can't exactly remember the time.

Q. So that again it is just your guess, is that correct?

A. Right.

Q. Sure. It could have been before nine thirty.

A. Between nine, ten o'clock, I can't exactly recall the right time.

Q. It could have been later than ten?

A. No.

Q. It could have been earlier than nine o'clock?

A. I don't think it was.

Q. You don't think it could have been?

A. It could be, yes.

Q. Sure. With respect to changing the sheets, you don't know what time that would have taken place?

A. No. I know nothing of the time for that.

Q. Now, you indicated that you heard some telephone -- that at least on two separate occasions that Mrs. Lord was using the telephone, correct?

A. Well, the first phone call --

Q. Let me ask the question again differently. In summing up all of your questions, in summing up all of your testimony, you told -- at least I got the impression that you saw Mrs. Lord using the telephone twice?

A. Mrs. Lord used the telephone once. The first phone call I answered because she was busy, she said she would call back.

Q. So then she did use the telephone twice or the phone was used twice in her room?

A. Yes, right, twice in her room.

Q. Was it used any other times that you were there?

A. No, not that I know of. When I was there it wasn't.

Q. Do other people have phones in their rooms?

A. Right.

Q. And do you remember how many other people that you observed using the telephones?

A. No, I don't.

Q. You don't. Did the FBI when they come in ask you specifically if you had seen Mrs. Lord using the phone?

A. No, they didn't. They asked me the question, I answered what I observed that day.

Q. Did they ask you if you observed her using the telephone?

A. No, they don't ask me, I told them.

Q. You told them?

A. Right.

MR. KREMER: May I have one moment, your Honor?

THE COURT: Yes.

MR. KREMER: I have no questions of this witness.

MR. MOREHOUSE: No cross, your Honor.

MR. COLICCHIO: I have no cross examination.

THE COURT: Anything further, Mr. Houlihan?

MR. HOULIHAN: No questions, your Honor.

THE COURT: Thank you, Mrs. DeCastro.

(Witness excused.)

MR. HOULIHAN: I am ready to continue with Mr. Hook.

RONALD HOOK, called as a witness on behalf of the Government, and having been previously duly sworn, resumed and testified further as follows:

DIRECT EXAMINATION BY MR. HOULIHAN (Cont'd.):

Q. Mr. Hook, prior to the recess you told us about going to social clubs with Mr. Yagy. How old were you at that time?

A. Seventeen.

Q. Now, I direct your attention to the date around April 5th or 6th of 1976 --

MR. KREMER: Excuse me --

MR. MOREHOUSE: It would be easier if you would raise your voice.

BY MR. HOULIHAN:

Q. I direct your attention to the date of April 5th and 6th, 1976, do you recall a conversation with Mr. Yagy that day?

A. Yes, I had a conversation with him out in front of the pizzeria.

Q. What did he say and what did you say?

A. Well, he asked me if I wanted to make some money and I told him yes.

MR. KREMER: Your Honor, I will make an objection on this being hearsay testimony, not binding in any respect on my client.

THE COURT: Yes, that is right.

MR. MOREHOUSE: Nor upon Schwartz.

THE COURT: Again, I haven't told you from point to point what evidence bears upon which of the individuals, but quite obviously now the witness is talking about Mr. Yagy, and at least at this juncture there has been no indication that either Mr. Schwartz or Mr. Lord was present. So that what he is saying about Mr. Yagy in a conversation bears only upon Mr. Yagy.

MR. HOULIHAN: Thank you, Judge.

MR. COLICCHIO: May we have a specific date, if possible.

THE COURT: The 4th or 5th of April.

BY MR. HOULIHAN:

Q. Now, Mr. Hook, what did he say to you and what did you say to him?

A. He asked me if I wanted to make some money.

Q. What did you say?

A. I said yes.

Q. Would you tell us what the conversation was?

A. He told me I would make enough to have a chance to get even with the money, even with him, meaning the $400 -- I owed him approximately $400 -- and I would have plenty more for myself. He said, "All you have to do is drive a car."

Q. Did you ask him anything further?

A. I said, "What do I have to do." He said, "You are going to rob a bank." First I said, "No, it can't be done, it happens all the time, everybody gets caught." He said, "Don't worry about it, we have inside information. We know how much money is going to be there, we know how many police cars are going to be there, and you will only be driving for approximately eight to ten seconds until you get into another car."

Q. Was there any further conversation at that time?

A. Yes, he told me that he would introduce me to who I would be working with soon, possibly the next day.

Q. Now, approximately how long did this conversation last, if you can remember?

A. Oh, twenty minutes I would say.

Q. And where did it take place?

A. In front of Mr. Yagy's pizzaria on Dewey Avenue.

Q. Did there come a time that you again discussed this matter with Mr. Yagy?

A. Yes. I discussed it -- I believe it was a Wednesday, the Wednesday prior to the bank robbery, and at that time he introduced me to a man named -- known to me as Jimmy O'Brien -- named Jimmy Lord.

Q. First, do you see the person that you know as Gerald Yagy in the courtroom today?

A. Yes.

Q. Where is he seated?

A. He is seated further away from me.

Q. What color suit?

A. Blue.

Q. Is that dark or light blue?

A. Dark blue.

Q. And do you see the person that was introduced to you as Jimmy O'Brien in the courtroom?

A. Yes seated closest to me in the plaid suit.

Q. Now, where did this introduction take place?

A. In front of his store once again, Gerry's store.

Q. Would you tell us what he said at that time?

A. He told me that we would be going through the route of the bank robbery.

Q. Who was talking at this time?

A. Yagy and Lord, they were both explaining to me.

Q. Okay.

A. Reassuring me that nobody gets hurt.

MR. KREMER: Your Honor, I object to this. At this time I would like to know who is saying what who the declarant is, what the declaration is, so I can make a proper objection.

THE COURT: If you remember, or to the extent you can, say who said what. Are you able to do that? Say what Mr. Yagy said, as opposed to what Mr. Lord or Mr. O'Brien, as you knew him, said.

THE WITNESS: Well, Mr. O'Brien told me that I would be meeting with his partner the day of the robbery. Most of the conversation was how easy this thing was going to be.

THE COURT: Was it mostly said by one or the other or did they --

THE WITNESS: They both commented.

THE COURT: Can you say who said what?

THE WITNESS: No, sir.

THE COURT: Go ahead. Were they both there all the time?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

BY MR. HOULIHAN:

Q. Now, had you seen Jimmy O'Brien prior to the time that you were introduced to him?

A. Yes, I seen Mr. Yagy borrow a sum of money, I don't know how much, from Mr. Lord at the 44 Club on 44 Lake Avenue a few days prior to the Wednesday that we had the conversation.

Q. You did not meet him at that time?

A. No.

Q. Now, what, if anything, did you do after the conversation?

A. Well, myself along with Gerald Yagy and Mr. O'Brian drove to the vicinity of the Columbia Savings Bank on Mt. Hope Avenue.

Q. What kind of a car did you go in?

A. We went in Mr. Lord's blue Nova.

Q. Do you know what year that was?

A. I believe it was a '75, I'm not sure.

Q. Now, the conversation, as I understand it, originally took place in front of Mr. Yagy's pizzeria, and then you drove someplace, where did you drive?

A. We drove to the vicinity of the bank where --

THE COURT: What bank is this?

THE WITNESS: Columbia, Mt. Hope Avenue.

BY MR. HOULIHAN:

Q. What was the purpose of going over there?

A. He was to drive me through the route which I would be taking to make our escape.

Q. Did you have a conversation at that time while driving over?

A. Mr. Yagy told me not to worry, everything was going to be okay.

MR. KREMER: I renew my objection, your Honor.

THE COURT: Who was in the car at this time?

THE WITNESS: Mr. Yagy, Mr. Lord. Mr. Lord was driving, Mr. Yagy was sitting in the front seat, I was in the rear seat.

THE COURT: All right. Overruled.

BY MR. HOULIHAN:

Q. Did Mr. Lord say anything to you at that time while driving?

A. Yes, he told me, "You are going to get nervous, when we go in the bank it's going to seem like we are in there an hour, actually it's only going to be a minute, don't panic, don't take off without us."

Q. Was there any discussion at that time about a previous plan?

A. Yes, they had told me they planned to rob --

MR. KREMER: Objection.

MR. COLICCHIO: Objection on the part of Mr. Yagy. We want to know who said what.

THE WITNESS: Mr. Lord told me they had planned to rob the same bank one week --

THE COURT: Did he say who he meant by "they"?

THE WITNESS: No.

MR. COLICCHIO: Objection on the part of Yagy.

MR. KREMER: Objection on the part of the defendant Lord.

MR. MOREHOUSE: Schwartz objects.

THE COURT: Overruled as to Lord and, of course, the jury will keep in mind that there is no indication -- this is said in Mr. Yagy's presence -- but Mr. Hook is not able to say who they were who were planning the earlier robbery. Go ahead.

BY MR. HOULIHAN:

Q. You may finish.

A. He said that one week prior to the actual robbery they planned to rob the same bank, but next door, the Wegman's food store had been robbed, there were many police officers in the vicinity of the area, they had to postpone it for a week.

Q. Now, approximately how long did this ride take, if you can recall?

A. Well, I believe it was fifteen seconds.

Q. Excuse me, from the pizzeria over to the Mt. Hope bank?

A. Oh, I would say a half hour.

Q. And during this period of time did Mr. Yagy say things to you?

MR. KREMER: Sorry, I didn't catch that.

BY MR. HOULIHAN:

Q. Did Mr. Yagy have a conversation with you?

THE COURT: During the ride did Mr. Yagy --

THE WITNESS: Yes, he did. I don't recall what the conversation was.

BY MR. HOULIHAN:

Q. You mean other than what you have already testified to?

A. Right.

Q. And during this ride did Mr. Lord have conversations with you?

A. Yes.

Q. Now, there came a time when you arrived at the Columbia Bank?

A. Yes.

Q. What, if anything, was said by anyone at the time you arrived in the vicinity of the Columbia Bank on Mt. Hope?

A. Mr. Lord pulled into the medical center parking lot, showed me a black '62 Buick, "That's going to be our first car, we're going to use that car in the bank robbery, and I'm going through the route with you." He took me out, I believe, Elmwood Avenue, around the corner into the plaza of the bank, and said, "You pull up to the bank and wait for us directly in front of the bank until we come out, and you proceed out of the plaza to Crittenden Boulevard, and make a quick turn into the hospital parking lot, there is bushes there so no one is going to see you turn, they have lost you already." Yagy at that time said, "I agree," there's no way they are going to see me drive out of the bank if I make that sharp turn. At that time Mr. Yagy said --

MR. KREMER: Objection.

THE COURT: Wait for another question.

BY MR. HOULIHAN:

Q. Did Mr. Yagy say something?

A. He asked me if I would like to go through the route one more time.

Q. What did you say?

A. Yes.

Q. Did you?

A. We did the same thing and --

Q. Now, you went through the route twice then on that night, that was Wednesday night?

A. Yes.

Q. What, if anything, did you do after you finished travelling that route twice?

A. We drove back to Mr. Yagy's pizzeria.

Q. And was there conversation between Mr. Yagy, Mr. O'Brien, as you knew him at that time, and yourself on the way back?

A. Yes. Mr. Yagy said everything was fine, and he would have me ready by Friday morning.

Q. And did there come a time that you arrived at the pizzeria?

A. Yes.

Q. And what, if anything, happened then?

A. Well, we all got out of the car, we walked into the pizzeria, me, Mr. Lord and Yagy, Yagy walked behind the counter and Mr. Lord handed him a paper bag with a .44 Magnum inside.

Q. And how do you know it was a .44 Magnum?

A. I didn't see it, but I assume it is, because --

THE COURT: All right.

MR. COLICCHIO: Your Honor, I ask the testimony be stricken.

THE COURT: I instruct the jury to ignore that bit of testimony as though it never had been said, it is not part of the evidence.

BY MR. HOULIHAN:

Q. After you returned to the pizzeria, did there come a time that you went home?

A. Yes. Mr. Yagy told me to go home.

MR. KREMER: Objection, your Honor. The question was did there come a time when you went home, and the answer is yes, then the witness proceeds to --

THE COURT: Wait for the next question.

BY MR. HOULIHAN:

Q. Did Mr. Yagy say anything to you at that time?

A. Yes. He said, "Go home, relax and keep in touch with me, I'll see you tomorrow."

Q. Did you see Mr. Yagy the next day?

A. Yes, I did.

Q. What day was that?

A. Thursday.

Q. And about what time of day did you see him?

A. It was at night, early evening.

Q. And where did you see him?

A. In his store.

Q. And did you go over to the store?

A. Yes, I went inside.

Q. What was the purpose of going over there?

A. Just to keep informed what was going on.

Q. And did you have a conversation with Mr. Yagy at that time?

A. Yes.

Q. Would you tell us what that conversation was?

A. Mr. Yagy told me --

MR. KREMER: Objection on the same grounds.

THE COURT: Overruled.

MR. MOREHOUSE: I also object.

THE COURT: It is not binding at all on Mr. Schwartz.

BY MR. HOULIHAN:

Q. You may tell us.

A. Mr. Yagy told me that he didn't want to hear any excuses about my ge[illegible]ld feet and backing out of this thing. He also sai[illegible] ever you do, don't tell the people you are working with your real age."

Q. All right. Did he say anything else to you about your age?

A. Yes, he told me, "Listen, because of your age they can't do nothing to you, they can't throw you in jail. Even if you should get caught for this, which I doubt, the most you could get is federal probation, because I want to tell you something, the federal authorities are the best people to do business with."

Q. Was there any conversation at that time about the possibility of getting caught?

A. Yes. He told me, "Ninety percent of the crimes solved in this country are from people opening their mouth and talking. As long as you keep your mouth shut, you are not going to get caught. If you are ever questioned by the police, you don't tell them anything."

Q. Now, approximately how long did you have this conversation, how long were you there?

A. Oh, I would say forty five minutes.

Q. And what did you do, did there come a time that you left?

A. Yes, I went home.

Q. And did Mr. Yagy say anything to you at the time that you left?

A. "Make sure you are up at seven thirty in the morning, I'm going to pick you up."

Q. Now, did you go home then after that?

A. Yes, I did.

Q. Now, calling your attention to Friday, the next day, what, if anything, happened on that day?

A. Seven thirty sharp that morning Yagy knocked at my door. I was already dressed, and got into the car. We proceeded to the Tiptop Restaurant on Lake Avenue. We walked inside, Mr. Yagy led me to two gentlemen, one by the name of Jimmy O'Brien, and another man I hadn't met, known to me as -- introduced to me as Gerry.

Q. Now, you see the person in the courtroom that was introduced to you as Gerry?

A. Yes.

Q. Would you point him out?

A. He is sitting in the middle with the light blue suit on.

Q. Now, from the time that you were picked up at your house at seven thirty until you arrived at the Tiptop Restaurant, did you have any conversation with Mr. Yagy?

A. Yes. Once again he told me not to tell these men my age.

MR. KREMER: Objection, the same objection.

THE COURT: Overruled.

MR. MOREHOUSE: The same for the defendant Schwartz.

THE COURT: Sustained as to Mr. Schwartz -- not sustained, it is not binding on Mr. Schwartz I should say.

Overruled, you may answer.

BY MR. HOULIHAN:

Q. You may answer the question.

A. Yes. He told me for me not to tell the two men my age. He said we would be meeting at his house after the bank robbery.

Q. Now, was there any conversation about what you should wear?

A. Yes. He told me to wear dark clothing and sunglasses.

THE COURT: When was this, on this Friday morning.

THE WITNESS: Yes.

BY MR. HOULIHAN:

Q. What were you wearing at that time?

A. Dark clothing and sunglasses.

THE COURT: He said this to you earlier?

THE WITNESS: Yes.

BY MR. HOULIHAN:

Q. Now, when you arrived at the Tiptop Restaurant did Mr. Yagy go in?

A. Yes he went in first, I followed him.

Q. Where did you go after you went in?

A. He walked up to Mr. O'Brian, or Mr. Lord and Gerry. I then sat with them, and Mr. Yagy went to the other side of the restaurant.

Q. He wasn't there when you were sitting with Mr. Schwartz and Mr. Lord?

A. No.

Q. Did you have a conversation at that time with Mr. Schwartz and Mr. Lord?

A. Mr. Lord introduced me to Mr. Schwartz, "This is my partner, this is who you will be working with, his name is Gerry."

Q. Did you know him as Schwartz at that time?

A. No.

Q. You know him now as Schwartz?

A. Yes.

Q. And at that time you knew Mr. Lord by the name of O'Brien?

A. Right.

Q. Now, would you please tell us what, if anything, Mr. Lord said to you?

A. Well, he told me, "When we go in -- when you pull up at the bank," he once again repeated, "This is going to seem like an hour but it will only be thirty seconds to a minute." He then told me there was supposed to be --

MR. KREMER: Objection. The testimony is 'that told me.' We are talking about conversations, not about this gentleman's conclusion.

THE COURT: 'That is what he told me'?

THE WITNESS: Then told me.

THE COURT: That is what I thought you said. He said, "Then told me."

MR. KREMER: My apologies, I withdraw the objection.

THE WITNESS: He told me there was going to be an armored car drop off on the counter of the bank -- they were to drop approximately four bags off --

THE COURT: Who said this?

THE WITNESS: Mr. Lord, and he didn't say how much was going to be in the bags. He said a great deal of money, over $100,000.

BY MR. HOULIHAN:

Q. Now, did Mr. Schwartz say anything to you at this time?

A. Yes, he said -- mostly what he said was repeating Mr. Lord, "We'll be in there, won't be long, we'll be right out, don't worry about a thing." I told him this is the first job I ever had. They looked at me, they were apprehensive, seemed apprehensive.

MR. KREMER: Objection, your Honor.

THE COURT: Overruled.

BY MR. HOULIHAN:

Q. Now, was there a procedure discussed at that time as to how it was going to be done?

A. Yes. He told me that they would be wearing overalls --

MR. COLICCHIO: Objection on behalf of the defendant Yagy as to what --

THE WITNESS: Not Yagy.

THE COURT: Wait a minute, wait a minute.

MR. HOULIHAN: Please relax now.

MR. COLICCHIO: I am objecting on the behalf of the defendant Yagy as to whatever transpired with these people in the restaurant or after the restaurant, not in the presence of the defendant Yagy, no tie up with Yagy knowing what is occurring.

THE COURT: I will overrule that. As I will tell you later, ladies and gentlemen, we are dealing with three counts in this indictment. Two of them are allegations dealing with carrying out the robbery itself, another one is an allegation of a conspiracy among these three defendants and Mr. Hook, who is not indicted, to carry out this robbery. Now, on those first two counts, what I have been talking about, cubicles and departments and cubbyholes, insofar as whether particular evidence bears upon one individual or the other, is pertinent. I have come to the point where there has been a satisfactory showing -- I am not taking away this ultimate decision from you -- in my determination at this time there has been a satisfactory showing from which, if you want to, you could determine that a conspiracy had come into being involving these four people for this purpose. Whether or not it came into being an who was a member is going to be for your ultimate decision, but at this point I now am admitting evidence by -- well, statements and actions by Mr. Lord or Mr. Schwartz in this case in the absence of Mr. Yagy, and if you find there was a conspiracy, and if you find Mr. Yagy was a member of it, then that testimony and evidence can bear against Mr. Yagy. I will tell you more about that in the future.

MR. COLICCHIO: For the record, I wish to note defendant Yagy's objection to any comments by the Court as to a satisfactory showing at this particular time.

THE COURT: I am not making the determination, I am only making the ruling that there now is in the case a sufficient amount of evidence which, if the jury did find there was a conspiracy with Mr. Yagy being a member of it, it would be sustained. Whether there was is their determination, not mine.

MR. KREMER: On behalf of the defendant Lord, I take exception to the Court's determination and the Court's ruling.

THE COURT: It is a procedural determination, the ultimate fact will be determined by you, the jury. Go ahead.

BY MR. HOULIHAN:

Q. Was there a conversation at that time concerning the procedure that would be followed during the bank robbery?

A. Well, yes. They told me they would be wearing masks and overalls, surgical gloves. He told me that I would be wearing surgical gloves, Lord also will be wearing tennis shoes. I'm not sure if Schwartz had tennis shoes or not.

Q. Was there any conversation at that time about the possibility of getting caught, the possibility of anyone getting hurt?

A. Yes. He assured me that he has never gotten caught before, he has done many bank robberies -- Lord is telling me this -- never got caught. He said he was caught once because someone testified against him.

Q. Now, was there any conversation about anyone getting hurt?

A. Yes, he assured me no one was going to be hurt.

Q. Now, did there come a time that you left the Tiptop Restaurant?

A. Yes, sir.

Q. And where did you go when you left the Tiptop Restaurant?

A. We went to another restaurant in the vicinity of the bank. I'm not sure the street the restaurant was on, and I don't know the name of the restaurant.

THE COURT: You say "we."

THE WITNESS: Me and Mr. Lord, Mr. Schwartz.

BY MR. HOULIHAN:

Q. And when you went to the second restaurant what did you do?

A. Well, we had coffee, and we were just more or less just killing time before nine o'clock when the robbery would occur.

Q. Now, did there come a time that you left that restaurant?

A. Yes, we did.

Q. Where did you go from there?

A. We went to Genesee Valley Park where we parked the car behind a shed or a bath house or something like that, and Mr. Lord and Schwartz changed into overalls, sneakers. Mr. Schwartz had a blue suit on, he put the overalls over the blue suit. I'm not sure of what Lord was wearing at that time. They also -- I seen Mr. Schwartz loading the gun, put two shells in the shotgun.

Q. You saw him put two shells in the shotgun?

A. Yes.

Q. Do you recall how long that shotgun was?

A. Oh, about two feet long.

Q. Was it a full sized shotgun?

A. No, certainly not, it was sawed off.

Q. Now, did there come a time that you were given gloves?

A. Yes.

Q. When was that?

A. That was at Genesee Valley Park.

Q. What car were you in at that time?

A. Mr. Lord's blue Nova.

Q. Who was driving?

A. Mr. Lord.

Q. And did there come a time that you left Genesee Valley Park?

A. Yes.

Q. And where did you go from there?

A. We then pulled in the medical center parking lot where Lord got out of his car and went over to the black '62 Buick, started it up, and we waited until the car got warm.

Q. Was there any conversation at that time between you and Mr. Lord and Mr. Schwartz?

A. Yes. Mr. Lord said, "I see you are getting nervous. I think it would be better if I drive the second car, and you stay in the back seat. Just get us out of the bank into the next parking lot, I'll take over from there."

Q. Did there come a time that you got into the Buick?

A. Yes, sir,

Q. And --

A. As soon as the car was warm we all got in. Mr. Lord sat in the back seat, Mr. Schwartz sat in the front seat, I was driving. We drove out of the parking lot, out to Elmwood, around the corner to Mt. Hope, and we pulled into the plaza where the bank was located, and I happened to notice the time on the digital clock in front of the plaza was nine o'clock sharp.

Q. At the time that you left the medical center parking lot was Mr. Schwartz or Mr. Lord wearing anything over their head and face?

A. Just before we pulled up to the bank they put stockings over their heads. We didn't go up right away, we noticed a small line of people in front of the bank, it had just opened, and we waited until they opened the door, we pulled right up.

Q. Now, when you pulled up, did you pull close to the front entrance?

A. Yes.

Q. Did there come a time that Mr. Schwartz and Mr. Lord got out of the car?

A. Yes, sir, they got out of the car carrying empty pillow cases.

Q. What was Mr. Lord carrying?

A. An empty pillow case and a handgun, a pistol.

Q. And what was Mr. Schwartz carrying?

A. Carrying an empty pillow case and a sawed off shotgun.

Q. And then what happened, can you tell us, please?

A. Well, they went into the bank, and Mr. Lord was right, it did seem like an hour. They came out approximately a minute later and we -- Mr. Schwartz jumped in the front seat, Lord in the back seat. Mr. Lord said, "Just go, speed, just go." I drove out of the parking lot, made the quick turn into the medical center parking lot and --

Q. By the bushes?

A. By the bushes, right, pulled into the medical center parking lot, I parked the car, we fled to the vicinity of Mr. Lord's blue Nova. He was driving, Schwartz was sitting in the front seat, I was instructed to lay down in the back seat because they would be looking for three men.

Q. Now, the route that you followed when you left the bank after the robbery, was that the same route that you had practiced some two nights before with Mr. Yagy and Mr. Lord?

A. Yes.

Q. As they came out of the bank were they carrying anything?

A. Yes, they were carrying their guns and pillow cases bulging with money.

THE COURT: They were bulging, you couldn't see what was in them, they didn't open it for you?

THE WITNESS: No, they didn't. I could see money through the pillow cases.

THE COURT: I see. All right, go ahead.

BY MR. HOULIHAN:

Q. You drove out of the parking lot, made the sharp turn around the bushes, went back to where you previously left off the Nova?

A. Yes, sir.

Q. And as I understand, your testimony is that Mr. Lord drove, Mr. Schwartz was next to him, and you were lying --

A. I was lying in the back seat.

Q. Were they wearing their stocking masks at this time?

A. No, they had taken them off. We drove -- Mr. Lord drove out of the parking lot onto Elmwood Avenue, I believe. I was lying down, I couldn't see where he was driving. I noticed he made a couple of turns. He stopped the car, I got up to look where we were, I didn't recognize the area. At this time they took off their overalls, Lord took off his tennis shoes, and they put them in a pile in the front seat. They asked me for my gloves, told me to put them in the pile also.

Q. Now, at the time that the three of you -- all of the three of you were in the '62 Buick, were you wearing gloves?

A. Yes, sir.

Q. Okay. Now, bringing you back again, the overalls were taken off and put in a pile, they asked you for the gloves, what next happened?

A. Well, we drove out, I was still lying in the back seat, I didn't know where we were going. We were driving down West Main, I heard a siren, we pulled over and a police car passed us by. This time I looked up, I knew where we were, on West Main Street. From there I stayed -- after I looked up, I was laying down in the back seat once again. We were in the downtown area. We made another stop, I got up and looked around, we were behind Neisner's downtown, where they had taken their equipment, their overalls and stockings, sneakers and the pillow cases and threw them in a dumpster there. It was an alleyway, where, you know, there is a lot of garbage in the alley, there were a couple of dumpsters around there.

Q. Now, you say they put the pillow cases there?

A. Yes.

Q. And I assume they took the money out of the pillow cases?

A. Yes, they put it in briefcases.

Q. And what about the weapons that you previously described?

A. They had them in the briefcases, too.

Q. And after the clothing was put in the dumpster, did you leave the area?

A. Yes.

Q. Where were you at that time?

A. We left.

Q. I'm sorry, where were you seated in the car, were you seated --

A. I was seated.

Q. And where did you go from there?

A. We drove to the Americana Hotel. We parked the car directly across the street from the Federal Building. Then Mr.

Schwartz walked ahead of me and Lord. He went in, went to the front desk of the Americana Hotel and got a key for a room. I don't know if he checked in earlier or --

THE COURT: Just tell what you know.

THE WITNESS: Okay.

BY MR. HOULIHAN:

Q. He got a key?

A. Yes.

Q. What did you do while he was getting the key?

A. Me and Mr. Lord were waiting by the elevator. We went up to the fifth floor. We went into a room, I'm not sure of the number, and they started sorting the money out on the bedspread, and they were -- some of it was wrapped in $1,000 piles -- they were counting, the rest of it was unwrapped.

MR. COLICCHIO: Would you read the last answer back?

(Thereupon the last answer was read by reporter.)

BY MR. HOULIHAN:

Q. Was there any conversation that you recall at that time?

A. No, not that I recall. They were just in a hurry to get the money counted. Mr. Schwartz was very loud in the room. I asked him to be quiet because there was a maid outside the door vacuuming in the hall. We got the money, most of it, sorted out. I saw approximately $35,000.

Q. And was there any conversation about Mr. Yagy at that time?

A. Yes. He counted my share out, which amounted to almost exactly $9,700, and he counted Mr. Yagy's share out. He said to me, "I'm going to give Yagy all the singles.'

Q. Who said that?

A. Mr. Lord. He said, "I'm sure he won't mind." That come out to be approximately $2,000.

Q. What were you doing at the time they were counting the money?

A. Well, I felt sick. I went to the bathroom, I thought I was going to vomit.

Q. Okay. About how long were you at the Americana?

A. Approximately a half hour.

Q. Did there come a time that you left?

A. Yes, I left before them. I told them I was nervous, I was going straight to Gerry's house and meet him there, as scheduled. I took a bus then up Lake Avenue to Britton Road.

Q. And did there come a time that you arrived at Britton Road?

A. Yes.

Q. What, if anything, did you see?

A. I see Mr. Yagy on the corner, and we walked up to the house.

Q. Did he say anything to you when you got off the bus?

A. He said, "How did everything go?" I said, "Okay, we got about $35 000."

Q. Did he say anything in response to that?

A. Yes, he said, "Okay, you done good, kid." He said, "Where is the money?" I said, "I left it with them." At this point he got very angry and told me it was a stupid thing to do. He said that -- well, his exact words were, "We may get fucked."

Q. Okay. This is while you were walking from the corner to his house?

A. Yes. We sat on the front porch and we waited for a period of time. We were talking and I told him that I was scared, that I seen somebody in front of the bank, I think they recognized me, they seen me, got a good look at me. He said, "Don't worry about it."

THE COURT: Put your hand down.

THE WITNESS: He then said -- an hour had gone by, and he said he wondered where they could be. He said, "That fat slob has a bullet coming." He was referring to James Lord.

BY MR. HOULIHAN:

Q. Was there any other conversation at that time? About how long were you waiting?

A. Waited approximately two hours.

Q. Was there conversation similar to the conversation you have already described?

A. Yes.

Q. Did there come a time that Mr. Lord and Mr. Schwartz arrived?

A. Yes, pulled in front of Mr. Yagy's house, got out of the car, went into the house. Mr. Yagy said, "What took you so long?" He said, "I was in other banks changing the money."

Q. Who said that?

A. Mr. Lord. So he asked him, "How did it go?" They said, "Fine." He asked Mr. Lord, "How did the kid do?" Lord said, "Fine. He got a little nervous in the end but he was okay." At this time --

THE COURT: Wait for a question.

MR. HOULIHAN: Wait a minute.

BY MR. HOULIHAN:

Q. Did anyone have any weapon at that time, to your knowledge?

A. Lord had a pistol. Mr. Schwartz, I presume he left the shotgun in the car.

THE COURT: We don't want to know what you presume.

THE WITNESS: I don't know.

BY MR. HOULIHAN:

Q. Did you say Lord had a pistol?

A. Yes, sir.

Q. What did he do with it?

A. He gave the pistol to Mr. Yagy.

Q. Did you see what Mr. Yagy did with it?

A. No.

Q. Did there come a time that the money was split up?

A. Yes. He had my share already counted. He pulled it out of the briefcase and said, "That's yours." He took Mr. Yagy's share, which was mostly one dollar bills, and he gave Mr. Yagy his share, and Mr. Yagy said, "Why aren't there any hundred dollar bills?" Mr. Lord said, "We found out that the Federal Reserve didn't bring in any hundred dollar bills in the City of Rochester today."

Q. Did Mr. Schwartz say anything at this time?

A. Yes. He walked up to Mr. Yagy and he said to him, "I think we fucked them this time."

MR. KREMER: Sir, I can't hear you.

THE COURT: Would you please read it back.

(Thereupon the last answer was read by reporter.)

BY MR. HOULIHAN:

Q. Did there come a time that Mr. Lord and Mr. Schwartz left the house?

A. Yes.

Q. And about how long were they there?

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A. Oh, fifteen minutes I would say.

Q. And you were left with Mr. Yagy?

A. Yes.

Q. And did you have a conversation with Mr. Yagy at that time?

A. Yes, I brang up the point someone had seen me in front of the bank. He told me not to worry about it, "If you had the sunglasses on, nobody would recognize you." Then he said, "Did you count all your money, is it all there?" I said, "Yeah." He said, "Count it again." So I counted it again, and it came out to be approximately $9,700. Mr. Yagy said, "I thought you were supposed to get $10,000, everybody was supposed to get $10,000? Do you have any extra money in your pockets?" I said, "No, what I have in my pockets and what is on the table amounts to $9,700." He said, "He shorted you a few hundred. I'll see if I can get it for you." I said, "Don't worry about it." So he then said, "Okay now, I'm going to take my piece," and took $4,000 from me, and said, "This is what you owe me for me setting you up with these people, $4,000."

Q. Now --

THE COURT: Is this a point where we can recess?

MR. HOULIHAN: That would be fine.

THE COURT: We will recess for ten minutes ladies and gentlemen.

(Thereupon the jury exited the courtroom at 2:33 P.M.)

THE COURT: Mr. Houlihan, I forgot to mention before we started at one o'clock this afternoon that prior to that time Juror Number 1, Mr. Charles, again came to see me, this time in the Clerk's Office, which I have been using as an office, and again indicated a desire to not continue in the case, and said he was finding it impossible to concentrate at all on what was going on. I told him we had talked about the matter, to go back to the jury room, which he did. I bring that again to your attention.

MR. HOULIHAN: As I recall, prior to jury selection he did come up and request an excuse when you asked for excuses.

THE COURT: He did not have any reason for not being on the jury, no personal reason, other than his working for, I think, Taylor Instrument, if my memory serves me correctly, and whoever it is, it was a company of about that magnitude and reputation. It surprised me, he said that the company made up the difference between the jury pay and what he normally makes. He said that the jury pay took so long in coming, being a matter of four or five weeks or so, which was going to leave him with approximately -- he mentioned $15 off this week's work, the combination of jury and make up pay, and he had bills, he mentioned rent which he was not going to be able to meet. We consulted and decided that we could expedite the jury pay coming to him, and on that basis I told him to stay in and be a possible juror at that point.

MR. MOREHOUSE: Your Honor, I don't think defendant Schwartz would want to take the position that the juror must serve, in view of his reluctance. Do you feel --

THE COURT: I am only making known to you what I know. If any of you want anything done about it, you can just let me know, and whether we do it or not, of course, is a different question. If you feel, Mr. Morehouse, on behalf of Mr. Schwartz, that he ought to be released, you may so state. If there is a consensus, I will probably follow the consensus.

MR. COLICCHIO: If your Honor please, on behalf of the defendant Yagy, I observed Juror Number 1 in the hall during lunch, he seemed to be down in the

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mouth, and I discussed this with Mr. Yagy this morning when you first mentioned this, and I discussed it again. It is too serious of a case to be wondering what is passing through the man's mind. If the Court has no objection, we would just a soon let him go home and put in Alternate Number 1.

MR. MOREHOUSE: That is all right with me. I would urge that measure be taken.

MR. KREMER: The same, the defendant Lord has no objection to excusing Juror Number 1.

THE COURT: What is your situation, Mr. Houlihan?

MR. HOULIHAN: I am interested in justice. If the defense wants that, I will be happy to consent.

THE COURT: What is the position of the Government?

MR. HOULIHAN: I have no problem with it.

MR. MOREHOUSE: Can you imagine what he just said, can you imagine that?

THE COURT: All right, we will excuse him when we come back. I will say he is excused, and Mrs. Adams, who is Alternate Number 1, will go into the position of Juror Number 1. I think it is Mr. Miller, who is Alternate Number 2, he will become Alternate Number 1.

MR. MOREHOUSE: Mrs. Adams is the first alternate?

THE COURT: That is right.

(Thereupon the court was in recess at 2:35 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3:06 P.M.

(Defendants present, counsel present, jury present.)

RONALD HOOK, called as a witness on behalf of the Government, and having been previously duly sworn, resumed and testified further as follows:

THE COURT: Ladies and gentlemen, I have excused Mr. Charles, Juror Number 1. He indicated he had some personal problems which were keeping him from concentrating on the evidence, and counsel and I have agreed because of that it is better that he be excused, this is the only reason. As a result of that, Mrs. Adams, you would move up to become Juror Number 1. Mr. Miller, you can move into the seat that Mrs. Adams' vacated. You now become Alternate Number 1.

DIRECT EXAMINATION BY MR. HOULIHAN (Cont'd.):

Q. Mr. Hook, just prior to the recess you testified that from your share of the bank robbery money Mr. Yagy took $4,000?

A. Yes, sir.

Q. Now, did there come a time that you left Mr. Yagy's house?

A. Yes, I did.

Q. And did you take the money with you at that time?

A. No, sir, I left it at his house.

Q. Why did you leave it at his house?

A. For fear maybe some of my family might run across it if I brought it into my house.

Q. Did you take any money with you when you left?

A. Yes, I had about $400 on me.

Q. Okay. What, if anything, did you do after you left?

A. I went home, took a shower, changed my clothes, and went to the corner of Ridgeway and Dewey, into a restaurant called Corfu Restaurant, located on Dewey near the corner of Ridgeway. I walked in and Mr. Yagy was in there with his kids and they were having fish dinners or whatever.

Q. Did you have a conversation with Mr. Yagy at that time?

A. Yes. I walked up and he showed me an article in the newspaper, in the afternoon paper, about the bank robbery and I read it, and I noticed in the article it said --

THE COURT: No, we don't want to know what was in the article.

BY MR. HOULIHAN:

Q. Just tell us what Mr. Yagy said to you?

A. He said that -- he asked me if I wanted to go to the 44 Club with him, and I did. We went there and Mr. Yagy didn't do any gambling, but he had some money on him, he was getting change from some of the other gamblers in there, giving them money from the bank robbery, asking for larger change.

MR. COLICCHIO: Objection, your Honor, conclusion as to the source of the money.

THE COURT: Yes. Tell what you saw and what you know, leave conclusions to the jury.

MR. KREMER: Your Honor, at this time the defendant Lord moves to strike the question and answer as being outside the scope of the alleged conspiracy, based upon what is in the indictment, and we have gone beyond what the prosecutor --

THE COURT: This is true. I indicated to you something about this Count 3 in the indictment which alleges a conspiracy, and I said that there had come a procedural point when I decided there was enough evidence now in the case so that if you decided that there was a conspiracy, it would be supported. I started allowing different pieces of evidence to come in and be applicable to everyone. I will define conspiracy for you later, but I will tell you now that it is something that has a starting point, and it is something that has an ending point. It also has constituent members who may be members at one time and not at another. Now, right at this point, on the basis of the evidence before me, it is again my procedural decision, subject to your ultimate decision, that there is not enough evidence now for you to find that there was an ongoing conspiracy. In other words, if you were to make that finding on the basis of what we now have here, I would say, as a matter of law, it is not. So at this point we are back in the position where things that Mr. Yagy did are now only applicable against Mr. Yagy.

BY MR. HOULIHAN:

Q. Now, you said that after you met Mr. Yagy at the Corfu Restaurant, you went to the 44 Club, did he have his children with him at that time?

A. No, sir.

Q. Well, about what time did you see him at the Corfu Restaurant, if you recall?

A. Oh, I would say about two o'clock in the afternoon.

Q. And what time did you go to the 44 Club?

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A. Approximately four o'clock in the afternoon.

Q. And while you were there you saw -- you were with Mr. Yagy?

A. Yes.

Q. And what was he doing?

A. He told me he was going to get rid of some of this money, get some bigger bills, and he tried to get -- change as much of the money as he could.

THE COURT: Say what you saw him do.

THE WITNESS: That is what I saw him do.

THE COURT: All right.

BY MR. HOULIHAN:

Q. Now, while you were at the 44 Club that evening, did there come a time that you had a conversation with him about a testimonial?

A. Yes. While he was changing the money, I went to a little room and watched television for a little while. When I come back he told he he bought two tickets to a testimonial dinner for a man that was a member of the social club, I don't recall the man's name.

THE COURT: Keep your hand down. The jurors should be able to see you while they listen to you.

THE WITNESS: Okay.

MR. KREMER: Objection, relevance as to any count, on the basis --

THE COURT: I don't know any relevancy at this point. I would agree with you. I assume the question was asked in good faith, we will see how it develops.

MR. KREMER: Thank you, your Honor.

BY MR. HOULIHAN:

Q. Would you please answer?

A. Would you repeat it?

Q. Did you have a conversation at that time about a testimonial?

A. Yes. He said he purchased two tickets, one for me, one for him, to go to the testimonial dinner where there would be a big card game. He wanted to be there. He said to me, in his own words, there was going to be a lot of action.

MR. COLICCHIO: I object to the relevancy, whatever they may have done.

THE COURT: Read the question and answer so I know where we are.

(Thereupon the last question and answer was read by reporter.)

MR. COLICCHIO: Your Honor, on behalf of the defendant Yagy, we object to the question and answer given on two grounds. One, as to relevance to the charges set forth in the indictment and, secondly, the only overt act charged against defendant Yagy in the indictment is the fact that certain gentleman met at Mr. Yagy's residence. I can't see what --

THE COURT: Addressing myself to your second basis for objection, I would say that is not a tenable basis for the objection. As to the first one, I would say still that I see no relevancy to this. Now, is some relevancy going to be developed, Mr. Houlihan?

MR. HOULIHAN: Yes, it is.

THE COURT: All right, go ahead. I will overrule it for the moment, but if it is not made relevant, I will instruct the jury to ignore it.

BY MR. HOULIHAN:

Q. Did there come a time that you went to the testimonial?

A. Yes. The next day, Saturday --

Q. Was this --

A. In the morning --

Q. Was the testimonial at night or in the morning?

A. At night.

Q. Now, we are into the next day, Saturday, the next day after the bank robbery?

A. Yes, sir.

Q. Beginning in the morning, what, if anything, did you do?

A. Well, me and Mr. Yagy went shopping in different stores downtown --

THE COURT: What is the relevancy, is there relevancy to that?

MR. HOULIHAN: To that particular question, your Honor, it is just --

THE COURT: Does it set the stage for something relevant during shopping?

MR. HOULIHAN: After shopping, your Honor.

THE COURT: All right, go ahead.

MR. COLICCHIO: Exception.

BY MR. HOULIHAN:

Q. Did there come a time after you went shopping that you went to St. Mary's Hospital?

A. Yes. Mr. Yagy said he would meet me that night to go to the testimonial dinner, and I left him sometime in the afternoon. About four o'clock in the afternoon I went to St. Mary's Hospital to visit a friend of mine, and I ran into Mr. Lord.

MR. COLICCHIO: I object to this. We don't know what he did on his own, we shouldn't be involved in it.

THE COURT: Let me ask you this, Mr. Hook. What you are going to testify about, does it in any way directly concern or have to do with Mr. Yagy, Mr. Lord --

THE WITNESS: Mr. Lord.

THE COURT: — Mr. Schwartz or more than one of them?

THE WITNESS: Mr. Lord.

THE COURT: All right, go ahead.

BY MR. HOULIHAN:

Q. Now, you said that you went to St. Mary's Hospital at approximately four o'clock?

A. Yes.

Q. Did you see someone there that you knew?

A. Yes, sir.

MR. KREMER: Your Honor, I object. First of all, you have indicated procedurally that the conspiracy had ended at a particular point.

THE COURT: I haven't ruled it has ended, I have ruled there is not now any sufficient evidence for the jury to find any further conspiracy. That may change, but it has not yet. Right now, if this concerns Mr. Lord, as Mr. Hook testified, then anything that happens bears only upon Mr. Lord. Go ahead.

BY MR. HOULIHAN:

Q. Who did you see?

A. I saw Mr. Lord out in front of the hospital. I asked him —

Q. You had a conversation with him?

A. Yes I had a conversation with him.

Q. What did you say and what did he say?

A. I asked him if everything was okay. He told me yes, sure. He said, "The federal police picked me up just after -- they picked me up right away," he said, "but --"

MR. KREMER: Your Honor, I object at this particular time. The statements that are made are not in furtherance of a conspiracy. They are not relevant, and the probative value is outweighed by other factors. I would object at this point.

THE COURT: Well, certainly from what he has said thus far, you are correct. You interrupted the answer, I don't know what the balance of it is. Obviously, somethings can be relevant and would bear upon Mr. Lord, other things would not be.

MR. KREMER: Your ruling then?

THE COURT: I am waiting for the balance of the answer.

MR. KREMER: Thank you, your Honor.

BY MR. HOULIHAN:

Q. What did Mr. Lord say to you?

A. He told me that the police picked him up shortly after the bank robbery, and they couldn't get any information out of him, there was nothing for me to worry about. He said he had a doctor saying that his toe was injured so badly he could harly walk that day, he had a cane with him.

MR. KREMER: I note my objection, your Honor, and ask for a mistrial at this time.

THE COURT: I will reserve on the mistrial, and strike all of that answer from the record, and instruct the jury to ignore it.

MR. HOULIHAN: Your Honor, may I be heard on that?

THE COURT: Not at this point. It is the type of testimony or evidence that might be pertinent as rebuttal. There is nothing in the case at this point that makes this relevant.

BY MR. HOULIHAN:

Q. Did there come a time later that day that you again met with Mr. Yagy?

A. Yes, I met with him again in front of his store. We drove to the Pittsford Plaza, out in the mall, where the testimonial dinner was held, and Mr. Yagy took part in a big card game, and he lost $2,000.

MR. COLICCHIO: I object to this, incompetent, irrevelant, what the man did or didn't do regarding a card game.

THE COURT: That is very true.

MR. KREMER: Your Honor, the defendant Lord renews his motion for a mistrial at this particular time based upon this testimony.

THE COURT: Which testimony?

MR. KREMER: The testimony as to what Mr. Yagy is alleged to have done at the Pittsford Plaza, on the grounds it is a cumulative thing that is designed to -- having no value against my client.

THE COURT: Certainly nothing that rises to the dignity of affording a mistrial, Mr. Kremer. Of course, as far as you are concerned, Mr. Colicchio, you are objecting on the ground of irrevelance?

MR. COLICCHIO: Irrevelance, I also, your Honor --

THE COURT: Also I think it is irrevelant at this point, and I will sustain that objection, and instruct the jury to ignore it unless it is tied in with something relevant.

MR. COLICCHIO: Your Honor, in addition, I also want to move for a mistrial on the grounds that not only is it irrevelant, but it is prejudicial to my man. How he spends his money or doesn't spend his money is immaterial.

THE COURT: Perfectly true, Mr. Colicchio. The jury is so advised.

MR. HOULIHAN: Your Honor, may I make an offer of proof, since I think this particular phase is very relevant. I would like to be able to demonstrate to the Court that aspect.

THE COURT: I prefer you to ask a question that would show the relevancy to me, if possible. Is it possible?

MR. HOULIHAN: It can't be done with one question, your Honor.

It would have to be a series of questions.

THE COURT: Are you stating there is relevancy?

MR. HOULIHAN: Yes, there is, your Honor.

THE COURT: I will allow you to proceed, go ahead.

BY MR. HOULIHAN:

Q. Mr. Hook, did you participate in that card game?

A. No, sir.

Q. Did you have a partnership agreement with Mr. Yagy at that time?

A. Yes, sir.

Q. And what was that agreement?

A. Half of what he lost would be my loss, too, but he said he wouldn't go past $1,000, he said he wouldn't go further than $1,000, he wouldn't lose that much. He lost $2,000.

Q. Now, what did that mean in terms of how much money you lost?

A. That meant I lost $1,000.

Q. Where did the $1,000 come from --

A. It was money --

Q. That you owed?

A. Pardon?

Q. Where did the $1,000 portion of the $2,000 lost, where was that money to come from?

A. My share of the bank --

MR. COLICCHIO: Wait a minute. When you see me stand, stop.

Your Honor, I object to where his money came from, what he did with money. The charge is that they robbed the bank and were guilty of a conspiracy in robbing a bank. The charge is not gambling or unjust enrichment between themselves. I want to know where is the relevancy on the issue of robbery.

THE COURT: That is right. Again, Mr. Houlihan, are we coming to the point of relevancy?

MR. HOULIHAN: Yes, your Honor.

THE COURT: Are you saying we have reached it?

MR. HOULIHAN: No, your Honor.

THE COURT: If you are saying that we are still on that road, I will allow you to continue.

MR. KREMER: My exception to your ruling, on behalf of the defendant Lord, your Honor.

THE COURT: All right. The question that is unanswered, can you find it, Mr. Noel?

(Thereupon reporter read as follows: "Q. Where did the $1,000 portion of the $2,000 loss, where was that money to come from?")

THE COURT: Answer that question.

THE WITNESS: The money came from -- half of it was to come from my share of the bank robbery, which Mr.

Yagy had been holding all the time, and half was supposed to come from his pocket, his share of the bank robbery.

THE COURT: In other words, if there was a loss, your share of the loss Mr. Yagy was to pay out of what money you say he held back on you?

THE WITNESS: Excuse me, sir?

THE COURT: If there was a loss, then you were to bare one half of the loss, and that money was to be paid by Mr. Yagy from money that he had held on your behalf from the bank proceeds?

THE WITNESS: That's right.

THE COURT: All right.

MR. COLICCHIO: Again at this particular time -- I hesitate to constantly object -- the point is the use made of this money. If these gentlemen did in fact, for the purpose of argument, take the money from the bank, this is irrevelant, it is just cumulative, piling it one on top of the other.

THE COURT: I ask again, Mr. Houlihan, are we still to come to a point of relevancy?

MR. HOULIHAN: Your Honor, yes. I would feel much better if we could have an offer of proof on this.

THE COURT: If you say that you are still going to come to a point of relevancy, I will let you continue.

When you reach it, all will be well. If we don't reach it, I will strike this line of questions and answers, and the jury will ignore it when they come to their deliberations.

MR. COLICCHIO: This is the point of it, you can go on for three hours.

THE COURT: We are not going on for hours.

MR. COLICCHIO: It is strictly cumulative and prejudicial. They could have burned it, for all I know, it still wouldn't add or subtract from the fact that there was a robbery.

THE COURT: I agree completely. Go ahead.

BY MR. HOULIHAN:

Q. Mr. Hook, subtracting the losses from that card game, how much money then did you have left, approximately, from your share of the bank robbery proceeds?

A. Okay. I explained to you that Mr. Yagy first took $4,000 from me, all right, plus another $1,000, that would be $5,000, and that would leave me with $4,700.

Q. You had taken some money, you said approximately $400?

A. Yes.

Q. All right. Now, did there come a time later that you had a conversation with Mr. Yagy about the remaining money?

THE COURT: Later what, that same day?

THE WITNESS: No.

BY MR. HOULIHAN:

Q. When did you have the conversation?

A. I had a conversation with him a few days afterwards. At this time --

THE COURT: All right, wait for the next question.

MR. COLICCHIO: Again I note my objection as to what these people did or did not do with their money. It doesn't deal with the robbery. I hesitate to have any more questions and answers given on this matter. I have no alternative but to move for a mistrial.

THE COURT: Are you so moving?

MR. COLICCHIO: Yes, I am moving.

THE COURT: I will reserve decision on it.

MR. COLICCHIO: Thank you.

MR. HOULIHAN: May I continue with my questioning?

THE COURT: Yes.

BY MR. HOULIHAN:

Q. So that a couple of days later you had a conversation with Mr. Yagy?

A. Yes.

Q. Would you please tell us what he said to you at that time?

A. Yes. He told me that Gerhard Schwartz had gone into a bank in Albany to change some of his share of the money, he gave approximately $1,000 to a teller.

THE COURT: Now, we are talking about Mr. Schwartz here, Mr.

Houlihan.

MR. HOULIHAN: This is Mr. Yagy telling what Mr. Schwartz did.

MR. KREMER: Objection, your Honor.

THE COURT: Well, of course, obviously not bearing upon Mr. Lord at this point, and as far as Mr. Schwartz, is hearsay, and unless we get to the point of it having some applicability to Mr. Yagy, it means nothing. I assume you have such in mind?

MR. HOULIHAN: I would be happy to give you an offer of proof out of the presence of the jury. This is lengthy testimony. I think --

THE COURT: Well, maybe it is quicker, ladies and gentlemen, to do that. I hate to keep scurrying you back and forth, but this will only take a few minutes. Maybe it will speed things up.

(Thereupon the jury exited the courtroom at 3:22 P.M.)

MR. MOREHOUSE: May it please the Court, your Honor --

THE COURT: We are going to have an offer of proof first.

MR. MOREHOUSE: May I get into the show before the proof is offered?

THE COURT: Let's find out what he has in mind, and then I will listen to you.

MR. HOULIHAN: Your Honor, do you want me to orally advise the Court of where I am going?

THE COURT: I want an offer of proof.

BY MR. HOULIHAN:

Q. Would you please tell us now what Mr. --

THE COURT: An offer of proof isn't the question and answer. Tell me in your own words what you are attempting to prove. Do you want Mr. Hook to step out while it is made, gentlemen?

MR. KREMER: Yes, your Honor.

MR. COLICCHIO: I would prefer it if the witness be removed.

THE COURT: All right.

MR. COLICCHIO: Any other witnesses in this room, I would like to have them removed.

THE COURT: All right. Any perspective witnesses will leave the courtroom.

MR. HOULIHAN: For the prosecution and defense, your Honor?

MR. COLICCHIO: Yes, both.

THE COURT: All perspective witnesses.

MR. HOULIHAN: Your Honor, if I can continue with the line of questioning, Mr. Hook will testify that in this conversation with Mr. Yagy that he told Hook that Schwartz went to Albany to change some money at a bank. While he was in the bank, the bank teller started checking the money next to a list of serial numbers, at which time he told Hook that Schwartz ran out of the bank.

THE COURT: Mr. Yagy told Hook that Mr. Schwartz ran out of the bank?

MR. HOULIHAN: Right. He then said that because of this, this must be marked money, and therefore he would have to change the some $4,000 that he was holding for Mr. Hook, and he could do that, but it would cost Hook twenty five percent of the money. So --

THE COURT: Anything more?

MR. HOULIHAN: I am coming to more, your Honor.

THE COURT: Go ahead.

MR. HOULIHAN: This would leave Hook with $3,000. The next night they went to a gambling hall on Portland Avenue, and Mr. Yagy was in a card game, with the same agreement. Mr. Hook was driving his father's car and had to leave at some point in the evening to return the car. When he returned, Mr. Schwartz -- or Mr. Yagy had lost $2,000 -- wait a minute -- he lost $2,000 by the time he left. When he came back, he lost all of the money. Sometime later Mr. Hook asked Mr. Schwartz if it had occurred --

MR. COLICCHIO: Have you got the right party?

MR. HOULIHAN: Yes. Mr. Hook asked Mr. Schwartz if he had been in Albany trying to change money in the bank, and if he then, because of the teller looking at the serial numbers, ran out of the bank, and Mr. Schwartz said no, that never happened. Hook then realized that Mr. Yagy was stealing his money, and then started to ask Mr. Yagy for money. In addition to the money that he lost on the exchange deal, he felt that Yagy had lost all of his money in a game when he wasn't there. Sometime in early July he again asked Yagy for money from the $1,000 that he felt he was cheated out of on the exchange, and the money that was lost, and sometime after that he spoke with Lord and Yagy, approximately July 12th or 13th, spoke with Lord and Yagy in front of the store, and Yagy --

THE COURT: Spoke to Lord and Yagy where?

MR. HOULIHAN: In front of the pizzeria.

MR. COLICCHIO: Lord or Yagy?

MR. HOULIHAN: Lord and Yagy, and that Yagy said he was going on vacation, and that they asked him to get out of town, to get packed.

THE COURT: "They," who?

MR. HOULIHAN: Again talking about Lord and Yagy, Mr. Yagy was talking, and told Mr. Lord that he should get out of town because there was going to be a lot of pressure put on by the police, they didn't think that he could take the pressure. He said --

THE COURT: You said, "told Lord to get out of town."

MR. HOULIHAN: Told Hook to get out of town -- I misspoke, your Honor -- and thereafter he called Yagy and said that his mother wouldn't let him leave town, and that was the last time that he talked to Mr. Yagy. Two days later he called up or went to Mr. Yagy's residence, Mr. Yagy was not there, but David Yagy, the brother of Gerald Yagy, was there, and he told him that Gerry Yagy wasn't at home, he went over to his aunt's house. Mr. Hook went over to his aunt's house to check there looking for his car, couldn't find it. On the day of July 16th he called Yagy's house, again got David Yagy on the phone, and David told him that he wanted to -- that he had been trying to get hold of him for two days, and he said that he wanted him to come down to talk to him.

He went down, and David Yagy told him that he was to meet James Lord at the Corfu Restaurant at some time between eleven thirty and twelve o'clock that evening. At nine o'clock that evening Hook went to the Corfu Restaurant, James Lord was there, they had coffee and they talked. Lord said, "I have the money for you, but I didn't bring it with me because I didn't think that you would show up, plus it is all in singles, it is bulky, so we'll have to go out to my house." They left the restaurant and went up the street toward Ridgeway Avenue, about to get into Lord's car when Mr. Schwartz showed up. There was an exchange where Mr. Schwartz said something to the effect that he wasn't home, and told Hook to get in the middle between them as they were going to drive out to Lord's house to pick up the money. They got into the car, they drove toward Ridge Road. There came a time that Mr. Hook told them that he had to go to the bathroom, they kept driving, it was a long way. He asked them if they would stop at the next place. They passed a couple of bars, then he said, "Stop the car anyplace so that I can relieve myself." They took certain turns, went to an area by a service road, they stopped the car. Hook turned to Schwartz and said, "Let me out," and Lord grabbed him from the back and held him and said to Gerry Schwartz, "Okay, give him his money." Whereupon Schwartz took out an ice pick and began stabbing Hook in the chest, dragged him out of the car, stabbed him again, with Lord holding him. Hook tried to get away. There was a period of blacking out by Mr. Hook. He again regained consciousness and Mr. Lord was then stabbing him, and then they left him at the side of the road after a statement that he would bleed to death. That would conclude the testimony, with the exception of his leaving the area and going to the hospital.

THE COURT: It certainly isn't pertinent after that. Now, gentleman, Mr. Kremer?

MR. KREMER: On behalf of the defendant Lord, your Honor, even to assume, for the first branch of Mr. Lord's argument that everything Mr. Houlihan says is going to be proven, that does not establish any further conspiracy on the part of defendant Lord to do anything, it does not show any continuation of the previous conspiracy, it simply is not probative of what it is my adversary is trying to show. This whole area is so highly prejudicial that if there were some limits of probative value as to further contact with Messrs. Yagy, Schwartz or Lord, so highly prejudicial that it would be outweighed by the prejudice that is going to ensue, because based upon what my adversary has said, there is not any proof of a continuation of the conspiracy. What my adversary is attempting to do is to prove that the conspiracy continued to this particular point. What we have is, at best, a situation where Mr. Hook is losing his money, but there is no proof that the events leading to the ultimate stabbing were a function of covering up and concealing the conspiracy, based upon what my adversary, Mr. Houlihan, has referred to. For all of these reasons, your Honor, I would move that the proof conclude at the point immediately prior to the offer of proof, and would strenuously object to the introduction of anything beyond the point where the Court excused the jury.

THE COURT: Mr. Morehouse?

MR. MOREHOUSE: Your Honor, the defendant Schwartz sees the state of proof in accordance with the following. If the conspiracy were proven, the conspiracy had to terminate with the division of the spoils. If the termination of the conspiracy were the division of the spoils, then Yagy became a bank for Hook, and Yagy held money for Hook. Another agreement was superimposed upon the questionably existent prior agreement. The conspiracy is terminated, and then Hook and Yagy make an agreement that they will split gambling debts or share gambling debts or write off the $350 or whatever he owed. That certainly was never part of the original conspiracy, if it is in fact proven. It seems to me that Yagy became a banker and Hook became a depositor, and Hook withdrew money occasionally, and sometimes Yagy would provide him with funds, sometimes he wouldn't, sometimes he would gamble it away. It has no probative value whatsoever, as far as the allegations contained in the indictment are concerned, nothing at all, and the defendant Schwartz further objects to witness Hook's testimony as to what Yagy said about Schwartz going to Albany. That is pure hearsay and just beside the point completely, and defendant Schwartz respectfully requests that the Court disallow the offer of proof, in accordance with Mr. Houlihan's offer, and that the jury be instructed to completely disregard any statement made by Yagy concerning Schwartz's activities in a bank in Albany.

THE COURT: Mr. Colicchio?

MR. COLICCHIO: Your Honor, on behalf of the defendant Yagy, first of all, I notice there are newspaper representatives here, and I respectfully request that the Court ask them, one, not to write articles of what they are hearing on this offer of proof or what they have already heard. I am going to ask they be asked not to write articles for two reasons. We have a jury now sitting in this case. Secondly, --

THE COURT: That would only follow if I would deny Mr. Houlihan the right to pursue that offer.

MR. COLICCHIO: The second reason I ask for that is that Mr. Yagy is presently under indictment in Monroe County Court on a charge that involves himself and others, in which Mr. Hook is an unindicted co-conspirator, for subsequent events that occurred, allegedly occurred, in July of 1976.

In addition Messrs. Schwartz and Lord are also under indictment on another matter dealing with the alleged assault by Mr. Hook. It becomes very prejudicial in case newspaper articles are written about all of these items. It sort of puts a limitation on counsel stating his position without being bound by some form of admission. As far as the offer of proof, I contend, on behalf of the defendant Yagy, that if in fact there was a conspiracy regarding the bank robbery, that terminated upon the disposition of the monies. Mr. Hook testified that he gave the money, if he is to be believed, he gave the money to Mr. Yagy to hold for him because he was embarrassed to go home with it. Anything that happened after that between these two people has nothing to do with the robbery. That conspiracy, if it occurred, terminated at that point. My second position is that the Government attorney and the Court and counsel here for each of the defendants well know that there is an occurrence that happened in the early part of July 1976, for which some of these defendants have been indicted, pertaining to another establishment, and which also included Hook, and there is also indication that Mr. Hook's problems regarding money arose from the second incident and not from the bank incident. Thirdly, I have before me Agent VanZant's affidavit, which was part of the complaint against the defendant Yagy for the matters for which we stand charged here today, in which VanZant states what Hook told him in an interview, and nothing in this affidavit even relates to what has been going on for the past hour and a half. We are talking about a robbery that occurred, and there is some participation by Yagy, allegedly, in that particular robbery. I also have Agent VanZant's 302 report which he got from Hook, the interview is 7/17/76, the day after, I believe, when is supposed to have been assaulted and, first of all, there is no mention of Yagy in it at all, no less all the other business which was in the offer of proof, and I have VanZant's 302, the date of 7/28/76, again which contradicts in some fashion what Hook stated on the stand. That, again, has nothing to do with the division of money or disagreement he had with anybody regarding how his money was being used or otherwise. I also have Hook's transcript of testimony before the federal grand jury, and there isn't one iota of testimony relating to what this offer of proof is here. To me it is highly prejudicial on the part of the defendant Yagy. It is cumulative in part, as far as the use of the money. If the robbery occurred, it occurred. As I said, if they burned the money, if they went to the race track, if they went to the OTB, if they used the money, it is immaterial, and to go into all the other items which are, your Honor, without doubt going to open the door to a number of occurrences and events which we are trying to avoid in this trial, events that occurred apparently in July of 1976, we will have had a long protracted trial, ending up not even trying the robbery case, we will be trying a disagreement among a lot of people after the bank was robbed. For those reasons, I object to it, and if the evidence is allowed to come in, I will move for a mistrial and continue to move for a mistrial. I am here to try a robbery case, not all the other incidents.

THE COURT: Mr. Houlihan?

MR. HOULIHAN: Yes, your Honor. First of all, with regard to Mr. Morehouse's comments regarding Schwartz, his statement that the conspiracy ended with the division of the spoils I think is inaccurate, where the two people that were involved in the bank robbery with Hook then stabbed him in order to prevent him from exposing a lot of people to the police in connection with the robbery of the Columbia Savings Bank. We have, with regard to Mr. Schwartz, a specific statement that he had heard that Ronnie Hook had been threatening to expose a lot of people in connection with the robbery of the Columbia Bank, and that they met at a coffee shop and Hook, believing he was going to get $2,000 in order to keep his mouth shut, drove out to a desolate area where they stabbed him to keep his mouth shut. With regard to the statement made by Mr. Yagy to Mr. Hook of what Mr. Schwartz told Yagy, that is not offered to show the truth of the facts contained in that statement. In fact, there would be testimony that that is false. It is offered to show the state of mind of this witness, so that the jury can understand why he was asking Yagy where the money that he felt Yagy cheated him out of. With regard to the defendant Yagy, the conversations that Lord had -- excuse me -- the conversations that Mr. Hook had regarding the money, the conversations regarding him leaving town because Mr. Yagy thought that he could not take the pressure of a police investigation were with Mr. Yagy specifically, made by Mr. Yagy. Mr. Lord was there, but didn't say anything. The next probative act is the meeting between Lord, Schwartz and Hook, whereupon he was stabbed. The allegations that Mr. Colicchio has set forth with regard to the complaint and the 302's of the special agent, the affidavit in support of the arrest warrant, are obviously the statements of the special agent upon information and belief, and merely satisfying minimum standard for what was necessary in order to obtain -- file a complaint and obtain a warrant. The content of the 302's depend specifically on the thoroughness of the questions asked by the special agent. The testimony of Mr. Hook before the grand jury obviously depends on what questions were asked him in the grand jury. There were no questions asked him in the grand jury regarding the stabbing. There was only sufficient evidence in the grand jury to establish the minimum proof needed to return an indictment. With regard to the defendant Lord, the stabbing by Mr. Lord of Mr. Hook can only relate -- I know the Court has access to other information concerning a Wegman's robbery -- there is no evidence, either in my file that I have read or any conversation that I have had with Sheriff's Office people or District Attorney's Office people, that Lord was in any way involved in the Wegman's robbery. The only possible reason for Lord to have stabbed Hook was to keep him quiet with regard to the Columbia Savings Bank robbery. The evidence that the complaint of Mr. Hook stem from him being cheated by Mr. Yagy of his money from the bank robbery --

THE COURT: What was that again?

MR. HOULIHAN: The statements -- Mr. Lord will testify that he -- Mr. Hook will testify that he felt that Mr. Yagy was cheating him out of his bank robbery proceeds. It was that that he asked -- the testimony will be that he asked Yagy for proceeds to make up the money that he lost as a result of Yagy's misusing the money that he was holding for him as a result of the bank robbery. The actions of Mr. Lord and Mr. Schwartz following those complaints, the presence of Mr. Lord with Mr. Yagy during that one conversation where they told Hook to get out of town, the conversations that Mr. Hook had with Mr. Yagy, saying that he could not leave town or would not leave town, form a basis for the jury to make a reasonable inference that there must have been a conversation between Yagy, Lord and Schwartz regarding the possibility of Hook testifying against them or giving up some information as a result of the police pressure. The stabbing by the -- first of all, the confession, admittedly limited to Mr. Schwartz, was based upon the Columbia Savings Bank problem. Mr. Lord was only involved in the Columbia Savings Bank problem. So the stabbing could only have occurred in order to suppress the possibility of Hook testifying against them.

THE COURT: All right. It seems to me you are going back over and already plowed field. Is there anything further that is new, any further thing that you want me to consider? It seems you have covered it adequately.

MR. HOULIHAN: I think I have. I think that is --

MR. COLICCHIO: Your Honor --

THE COURT: You want to say something new?

MR. COLICCHIO: Very, very briefly, your Honor. On behalf of the defendant Yagy, we point out to the Court --

THE COURT: I know what the ruling is going to be. I am open minded until you finish.

MR. COLICCHIO: Thank you, your Honor. On behalf of the defendant Yagy, we remind the Court that the state of mind of Mr. Hook or the disposition of monies that he claims he got from the robbery are not elements of the robbery charge.

THE COURT: I think you mentioned that before.

MR. COLICCHIO: Number two, the United States Attorney overlooks the fact that there is an intervening alleged robbery that occurred at Wegman's which played a part, I am sure, in Mr. Hook's problems. I bring to the Court's attention a newspaper article of December -- excuse me -- January 5, 1977, Democrat & Chronicle, after Gerhard Schwartz was arrested and brought back to Monroe County, and for which he was indicted, among other things, for the attempted homicide of Ronald Hook, and the article states, among other things, that Hook was stabbed a number of times "after he demanded his share of money from the robbery of the Wegman's Food Market in the Pittsford Plaza, according to the indictment charging Schwartz with the attempted murder." Now, your Honor has before him the Monroe County grand jury minutes. I think it has before it the police reports from the Sheriff's Department, and either the Greece Police or the Rochester Police Department, and perhaps this may be an appropriate time to examine the documents, to bear out the fact of this relationship with Hook and the bank monies or the Wegman monies.

THE COURT: For me to examine it?

MR. COLICCHIO: Well, I don't know whether your Honor should examine it without us. I take the position a governmental authority has already indicted Schwartz on the basis that Hook did not get the money from the Wegman robbery.

THE COURT: I am in the process of examining various documentary materials. I have gone through that which has been provided to me by a member of the office of the Corporation Council. I have not as yet gone through that provided by the Sheriff, but I will. But the idea of that is to make proper material available at the proper moment, not until then. I won't be opening that up to your inspection right at this time.

MR. MOREHOUSE: Your Honor, briefly --

THE COURT: Something new?

MR. MOREHOUSE: Something brand new. I find that logic compels me to now face, if Mr. Houlihan's proof is allowed, to now face a new conspiracy and defend Schwartz on a new conspiracy with Lord, a conspiracy to murder Hook --

THE COURT: No.

MR. MOREHOUSE: -- to maim him, dissuade him in some way.

THE COURT: It is true that, of course, you can have more than one conspiracy. We have a conspiracy charged in the indictment, and which I found that sufficient evidence, if the jury decided that was what was there, that that finding would be supported, namely, a conspiracy among the four to violate Section 2113 by robbing the Columbia Savings & Loan Association --

MR. MOREHOUSE: Right.

THE COURT: -- which started at a certain time, and to my mind, as far as the proof, had come to a certain end. It is possible that there could be a further conspiracy, the purpose of which was to still Mr. Hook's voice --

MR. MORKHOUSE: Rub him out, correct?

THE COURT: -- that would be a separate conspiracy. None such is alleged, it cannot possibly be proven here as a separate conspiracy.

MR. MORKHOUSE: I don't think so.

THE COURT: I had had in mind, and Mr. Houlihan also had in mind in his specifying the date of the indictment as the end point of the conspiracy charged in Count 3 of the indictment, that part of that single conspiracy could be a conspiracy to keep Mr. Hook quiet by doing away with him. I was of that mind earlier, I am less of that mind now, whether that can be part of that conspiracy, and I am still in a state of flux on it. However, as far as any separate conspiracy, it cannot be proven. You don't have to worry about meeting it. Now, I have decided, however, that the stabbing episode, properly shown, with tenable basis for motivation of keeping Mr. Hook quiet, can be proven as part of Counts 1 and 2 of the indictment. All right. I have made that determination right now — I made it earlier, I announce it now. Consequently, I do find relevant and admissible the proof bearing upon motivation and means for keeping Mr. Hook quiet. Now, where we have gone astray and what led us into all this trouble has been all this mish-mash, Mr. Houlihan, that we have been going into about gambling and losses and all that type of thing, and thinking he had been cheated out of his money, has nothing to do with the lawsuit at all. If we come to the point where Mr. Yagy and Mr. Hook and Mr. Lord are standing in front of the pizzeria and they are talking about Hook not being able to stand the pressure, police pressure, relative to an interrogation about the bank robbery, and that he should get out of town, and thereafter he tells them that he cannot or will not get out of town, and then to the meeting set up, the jury might properly infer, at the behest of Mr. Yagy, through his brother David or Donald, whatever his name is, with Mr. Lord and Mr. Schwartz, and the episode of the car ride and the stabbing, that is pertinent, and be admissible. Let's get right to that point. In that I recognize there is this element, this alleged ruse used by Mr. Lord in getting Mr. Hook to go along with the ride, namely, that he is going to get some money, but I think that, in and of itself, need not be gone into expansively, it can just be there, and we don't need to spell out any righteousness or justification on the part of Hook for thinking he has some money coming, and getting into all of that. The fact that it is relevant is that there was the motivation, thinking that Hook would break down, and this was the mechanization to try to keep him quiet.

MR. KREMER: Your Honor, the defendant Lord takes exception to your ruling --

MR. MOREHOUSE: As does defendant Schwartz.

MR. KREMER: -- that is, the ruling allowing any part of the offer of proof.

MR. COLICCHIO: Your Honor, we take exception. Is it my understanding that we are going to be permitted to ask Hook about Wegman's.

THE COURT: That is up to you.

MR. COLICCHIO: I mean that is part of the motivation.

THE COURT: Mr. Houlihan will not. All right, bring back the jury. Bring Mr. Hook in, then bring back the jury.

RONALD HOOK, called as a witness on behalf of the Government, and having been previously duly sworn, resumed and testified further as follows:

THE COURT: Mr. Hook, we are going to proceed, and I admonish you again, as I did earlier, that I want you to pay attention to the questions and merely answer the questions. You do have a tendency to go into a narration, rather than just answering questions, which lets the thing get out of control. If you would watch that, I would appreciate it.

THE WITNESS: Yes, sir.

THE COURT: Bring in the jury.

MR. HOULIHAN: May I confer with the witness for a second before the jury comes in?

THE COURT: No, he will follow along with your questions.

(Thereupon the jury entered the courtroom at 4:10 P.M.)

THE COURT: I will start out by saying, ladies and gentlemen, that I made a misjudgment as far as the time involved. The offer of proof and the arguments thereupon have taken a longer time than probably would have been used up by going through the questions and answers in getting to what I have declared to be a pertinent area. Nevertheless, here we are. We have had questions and answers and therefore evidence before you about gambling operations on a partnership basis supposedly going on between Mr. Hook and Mr. Yagy, and the loss of money, and so on, and all of that I am striking from the record, that is out, it means nothing, and you are to ignore it. Mr. Houlihan is going to start in at another point which has relevancy.

MR. KREMER: Your Honor, you say "relevancy," would you instruct the jury that relevance does not mean the decision is taken from them?

THE COURT: Evidence must be relevant before I will receive it. If it is not relevant I would not receive it. There are other grounds for keeping out evidence also, but relevancy means it has some pertinancy to what you are later going to decide, and I am dealing with that as Mr. Houlihan has indicated his offer of proof, what the evidence is, I don't know, and if what Mr. Hook says is not relevant, I will strike that. Go ahead.

DIRECT EXAMINATION BY MR. HOULIHAN (Cont'd.):

Q. Mr. Hook, directing your attention to the 12th or 13th of July, did there come a time that you had a conversation in front of the pizzeria?

A. Yes, sir.

Q. And who was there at that time?

A. Gerald Yagy, James Lord.

Q. And was the pizzeria open at that time?

A. No, sir, Mr. Yagy had signs posted in the window that he was on vacation for a period of time, I'm not sure.

Q. Did you have a conversation with Mr. Yagy at that time?

A. Yes, sir.

Q. And what, if anything, did he tell you at that time?

A. He told me he would have liked to see me get out of town for a few days because the police were going to come and question me.

Q. And why did he want you to get out of town,what did he say, if anything?

A. What did he say? He said -- your Honor, I don't want to go into anything you advised me not to.

THE COURT: That is true.

BY MR. HOULIHAN:

Q. Okay. Was there a conversation at that time about pressure being put on you by the police?

MR. KREMER: Objection, leading.

THE WITNESS: Yes.

THE COURT: I will allow it under the circumstances. Overruled.

BY MR. HOULIHAN:

Q. And that was in connection with the bank robbery, is that correct?

A. No, sir.

MR. KREMER: I'm sorry.

MR. MOREHOUSE: The answer is no.

MR. COLICCHIO: Your Honor, at this time --

THE COURT: All right. The rules have changed. The jury will ignore that. That is stricken from the record, the jury will ignore it.

MR. HOULIHAN: Your Honor, there was a continuing conversation at that time. May I pursue that?

THE COURT: He said it had nothing to do with the bank robbery.

MR. COLICCHIO: Excuse me, Mr. Houlihan.

THE COURT: Wait for a question.

BY MR. HOULIHAN:

Q. How long was the conversation at that time in front of the store?

A. About fifteen minutes.

Q. What did Mr. Yagy tell you at that time?

MR. KREMER: If the Court please, I move for a mistrial.

MR. MOREHOUSE: I object to any continuance of this line of questioning.

THE COURT: So directed, Mr. Houlihan.

MR. HOULIHAN: Your Honor --

THE COURT: The motion for a mistrial is reserved.

MR. COLICCHIO: On behalf of all defendants, your Honor?

THE COURT: Yes.

MR. MOREHOUSE: He is bound by --

THE COURT: Sit down, Mr. Morehouse, we are going ahead, please.

MR. HOULIHAN: Your Honor, I think the explanation ought to be out of the presence of the jury.

THE COURT: I don't want you educating the witness. I had made a ruling relating to certain relevancy and pertinency of a part of your offer of proof. That has now changed. It is now all irrevelant and non-admissible.

MR. HOULIHAN: May I argue this point out of the presence of the jury and out of the presence of the witness?

THE COURT: If that is out, if that is done with and not to be gone into, do you have any further direct examination of Mr. Hook?

MR. HOULIHAN: Yes, I do, your Honor. Well, no, I wouldn't have any further direct examination.

THE COURT: The jury is excused then until nine o'clock tomorrow morning, and we will pick up the thread of things then. The same admonition, keep your minds open on everything, don't talk about it, particularly not with anybody else, and keep your eyes off the media and the tube, as far as the case is concerned.

(Thereupon the jury exited the courtroom at 4:15 P.M.)

MR. COLICCHIO: Your Honor, on behalf of the defendant Yagy, I renew my request that the newspaper representatives or other news media representatives be asked not to print articles on the offer of proof, since there are pending criminal matters in other jurisdictions which may be prejudicial to one or more of the defendants here today.

THE COURT: Well, Great Britain has such controls and muzzles on the press, as far as criminal proceedings, but here in the United States we do not, and I will not admonish or direct the press, even if I had the power to do so.

MR. KREGER: I applaud the Court's decision. There is too much muzzling of the press already.

MR. COLICCHIO: It is not a matter of muzzling --

MR. MOREHOUSE: Let's not argue, gentlemen.

THE COURT: Let's go on. Mr. Hook has taken away all relevancy to the stabbing episode by his answer that it had nothing to do with the bank robbery.

MR. HOULIHAN: Your Honor, I disagree, on the basis --

THE COURT: You are entitled to, I will allow you to disagree.

MR. HOULIHAN: Okay. I think the witness' answer was there were many things said, it was a joint reason, and I think that if I were allowed to pursue this with him out of the presence of the jury that we may be able to reach that point.

THE COURT: Well, I will tell you what I will do on it. If I can bother Mr. Noel to run through the four or five questions and four or five answers that came about as I brought the jury back in at about nine minutes after four, and to the point then when they went out, I will resolve that and look at it, and if I change my mind, I will make a decision in the morning on it. If what you say is true, that it lends itself to some tenable inference by the jury that the bank robbery was involved in it, then I will reconsider it. All right, anything further, gentlemen?

MR. KREMER: I'm sorry.

THE COURT: I am about to recess unless someone has something further.

MR. MOREHOUSE: Good evening, your Honor.

THE COURT: Nine o'clock tomorrow morning, gentlemen.

MR. HOULIHAN: Your Honor, I would like to point out that during the examination -- I'm not sure if that is on the record -- that Mr. Hook was about to offer an explanation, and I certainly don't want to get into the position of talking to the witness now and then finding out that his explanation is that they talked about many things, the Wegman's robbery and the bank robbery, that he was concerned only about that.

THE COURT: I will look at what went on as Mr. Noel gives it to me in the morning, and I will make a decision on it.

(Thereupon the court was in recess at 4:25 P.M.)

* * * * * *

TRANSCRIPT OF PROCEEDINGS AND TESTIMONY OF RONALD HOOK, dated 2-11-77.

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 9:25 A.M.

(Defendants present, counsel present, jury absent.)

THE COURT: Mr. Kremer, you had something?

MR. KREMER: Yes, your Honor. I had brought to your attention, your Honor, a clipping from the Democrat & Chronicle, specifically a clipping on February 10, 1977, on Page 2B, entitled "Witness: Bank Theft Postponed," which is a two column item dealing with the several events of the testimony on that particular point. I have before me the Democrat & Chronicle for Friday, February 11, there is an article on Page 1B that is entitled "Gambling Led to Role in Robbery." It is one full column running the entire page, continued onto the second page, approximately a half column in length. The critical portion of the article on February 11th is the fact that the witness, Mr. Ronald Hook, is in the Federal Witness Protection Program. I would point out that the Democrat & Chronicle is a paper of general circulation in the County of Monroe. It is the only morning paper. The circulation is approximately two hundred thousand. There is some likelihood that one or some of the jurors would have seen any or all of the articles. I would ask that the Court poll the jury to see if any jurors have read these articles and, if they have, conduct an individual voir dire to see if the jurors have been influenced by these articles, and then at the conclusion of the voir dire, a cautionary instruction that the jury is to disregard any accounts they have read, and a further continuing instruction each recess. That is made on behalf of the defendant Lord.

THE COURT: Do you want to mark these as exhibits, Defendant's Exhibits 3 and 4?

MR. KREMER: Yes, your Honor.

(Thereupon newspaper clippings referred to were marked Defendant's Exhibits 3 and 4 for identification.)

MR. MOREHOUSE: The defendant Schwartz joins in Mr. Kremer's motion.

MR. COLICCHIO: The defendant Yagy joins in the motion also, and adds that a critical portion of the article deals with the stabbing of Ronald Hook, which the Court --

THE COURT: In these two articles?

MR. COLICCHIO: Yes, sir, there is mention in --

THE COURT: I don't believe so.

MR. KREMER: Look at this morning's.

MR. COLICCHIO: That is yesterday's?

MR. KREMER: That is right.

MR. COLICCHIO: Yes, the Democrat & Chronicle, February 11, 1977, Page 4B, which is the front page -- excuse me -- Page 1B, which is the front page of the second section, several paragraphs down where it states, "He is now in the Federal Witness Protection Program after recovering from an assault July 16th in which he was stabbed forty seven times with an ice pick," and it is in the same paragraph about the Federal Protection Program, there is specific detail reference to that assault, which is not part of this case.

MR. KREMER: That is Exhibit 4.

THE COURT: The February 11th edition?

MR. KREMER: Yes, your Honor.

MR. COLICCHIO: I would add that the Democrat & Chronicle is not only the only morning paper in Monroe County, it is the only morning paper in general circulalation within the Genesee Region, which takes in more than just Monroe County, it takes other county areas from which perspective jurors may be from, one or two on this jury panel could be from. It is not limited to Monroe County alone.

MR. KREMER: Thank you.

THE COURT: Mr. Morehouse?

MR. MOREHOUSE: I don't care to be heard, your Honor, other than joining in the motion with the other gentlemen.

THE COURT: All right. Defendant's Exhibit 3 is which?

MR. KREMER: The Democrat & Chronicle for February 10th, your Honor.

THE COURT: What pages do you have there?

CLERK: February 10th is Page 2B your Honor.

THE COURT: All right. Is there anything you want to say, Mr. Houlihan?

MR. HOULIHAN: Your Honor, I haven't seen the articles, I saw the one the day before, and I don't see anything that is inaccurate, insofar as the reporting of what went on in the courtroom. With regard to the second one, "Gambling Led to Role in Robbery," it is my understanding that the Court's ruling was that that portion of the gambling that was struck from the testimony was after the bank robbery.

THE COURT: I think the article refers to gambling leading to the bank robbery, doesn't it?

MR. HOULIHAN: Yes, and that was not struck, as I understand it.

THE COURT: That was not struck, that is right.

MR. HOULIHAN: I didn't read that portion with regard to the stabbing, but if it is all that Mr. Colicchio read, it doesn't refer to who —

THE COURT: Any stabber?

MR. HOULIHAN: Any stabber. In addition, I believe the Court made a cautionary instruction to the jury at the beginning of the case not to read the newspapers, and told them the only evidence in the case is what comes from the stand.

THE COURT: Yes.

MR. COLICCHIO: I wanted to point out that it may not indicate who was the stabber, but the preceding paragraph which consists of five lines, states, "Charged are," and then it names the four defendants. The following paragraph says —

THE COURT: Four defendants?

MR. COLICCHIO: Three. Charged are Gerald Schwartz, it gives an address, James R. Lord, Jr., it gives an address, and Gerald Yagy, and gives an address. That is the one paragraph. In the next paragraph, "Hook was named as a co-conspirator but not charged. He is not in the Federal Witness Protection Program after recovering from an assault July 16 in which he was stabbed forty seven times with an ice pick." It goes on to another paragraph, giving a historical resume of how all these things started. The point is that as of last night this business of a stabbing was taken from this case, the business of post robbery social activities, if there were such, between Yagy and Hook were taken from the case, and we specifically pointed out in the voir dire after the Government counsel planted the seed about a stabbing, that unless it was proven and connected up in the case, they were to remove it from their minds. Two of the perspective jurors indicated difficulty in doing this. Now we have an article that these people read that we are trying to keep from them. There is in the article a showing of what tragedy happened to this boy, it happened, and they are going to see this, they are human.

THE COURT: I had several times instructed the jurors to not read anything in the newspapers or watch anything on television or listen to anything on radio that had anything to do with this case. I further admonished them that if inadvertently some such did come to their attention, to expressly put it out of their minds, and it is my opinion that to say something more about it, other than what I will continue to do along that same vein, to say something in addition to that relating to the particular articles is going to only make those articles, I think, a magnet for them, which they will seek out and read, whereas if they follow my general instructions, they will not. If anyone has read it, I see nothing per se that is prejudicial to the defendants out of any circumstances that Mr. Hook may be in the Federal Protection Program. I would be immensely surprised if the jurors know what that program is, who pushes the button to put it into activity, into action, and for what purpose or reason. If they take it on its face, they see that he is in the federal pocket, so to speak, and being protected. Now, obviously, he was put on the stand as a government witness, his direct testimony has been in line with part of the prosecution's case, so they know he is in the Government's pocket to that extent. I think to go further would only accentuate things. It is unfortunate that there is this further reference to stabbing but, again, it is similar to what Mr. Houlihan said in his opening, where he in good faith thought there was going to be evidence of stabbing in the case. Here there is no attribution of that to anybody who is involved in the case. Consequently, I am going to decline to make any particular point of this with the jury. I will continue to admonish them at different recesses not to get involved with the media, as far as this case is concerned. I will leave it at that juncture.

MR. COLICCHIO: I wish to point out to your Honor that we -- I am using the word editorially -- in Monroe County had an experience in a homicide case in county court that lasted a number of weeks, multiple defendants, the jurors were admonished daily not to do what your Honor has been admonishing these jurors, and it turned out after the trial and a conviction that there was one juror not only read, but clipped clippings out of the newspaper and pasted them in his scrapbook with his personal comments under each clipping. Sometimes we wonder how much admonishment gains us.

THE COURT: I am sure that is right, Mr. Colicchio. I wish there were some set of buttons that could be activated from outside of each jurors' head to turn off this, that, and the other thought. Unfortunately, we don't have that science.

MR. KREMER: The defendant Lord takes exception to the Court's ruling. Thank you, your Honor.

MR. COLICCHIO: The defendant Yagy takes exception.

MR. MOREHOUSE: And Schwartz also excepts.

THE COURT: At the conclusion of yesterday I indicated that I would examine the transcript of what occurred here in the courtroom beginning at 4:10 P.M. until the time we recessed, and I have done that, and I am satisfied in my mind that Mr. Hook did say that the conversation in front of the pizzeria, relative to his leaving town, that was not at all premised upon and did not refer to the bank robbery. As a consequence, I will adhere to my ruling that that is not to be gone into any further on that basis. Have you seen the transcript?

MR. HOULIHAN: No, your Honor. I would like to say a couple of things. I do not quarrel necessarily with the Court's ruling in the sense that I do feel that certainly it is within the Court's discretion. I do, however, quarrel with the Court's ruling in the sense that I do think that it is inaccurate given the circumstances. I would like to only put on the record, your Honor, that I feel compromised to an extent that we were not able to go into this last evening, and now I was placed in the position of talking with Mr. Hook last night to find out what he said. I do not want to put that evidence before the jury because I do feel that that will look as though I had some influence over what he said. In my meeting with him following the courtroom session last night I asked very careful questions, not indicating what happened or why I was asking the questions, but the thrust of what was told to me was that when he returned to the courtroom we all of a sudden switched from a date of about April 12th when the exchange of money was going to take place, to July 12th or 13th in front of the pizzeria. The conversation that he related in front of the pizzeria to me was that Mr. Yagy said to him something to the effect, 'They talked to Dixon -- who is the manager in the Wegman's robbery -- and the police are going to be coming around and talking to you, and they are going to put a lot of pressure on, and when they do that we are afraid that you are going to collapse and blow the whole thing,' and the fact that Mr. Lord was with him, in his mind, meant that the whole thing was not only the Wegman's robbery but the bank robbery. When I discussed this with him prior to yesterday we had discussed the whole thing. When I went in during the recess when the Court admonished me not to mention anything about the Wegman robbery, I then told him, "Don't mention the Wegman robbery for any reason at all."

THE COURT: I had told him, and he paid attention to that, as is obvious by his response. When you said, "Why did he want you to get out of town, what did he say, if anything," Mr. Hook said, "What did he say? He said --" Your Honor, I don't want to go into anything you advised me not to." I said, "That is true." He was very cognizant of my instruction.

MR. HOULIHAN: The reason that I wanted to put this on the record, I want the Court to know that my offer of proof was made in good faith, my pursuing of that matter in court was made in good faith.

THE COURT: I am sure that is so. There is no question about that in my mind.

MR. HOULIHAN: Next there are two matters that I would like the Court's advice on. First of all, yesterday during the course of the testimony on the subsequent gambling, the Court made the general instruction that this business on gambling is totally struck and the jury is to disregard that.

THE COURT: That is right. I said to the jury, "We have had questions and answers, and therefore evidence before you about gambling operations on a partnership basis, supposedly going on between Mr. Hook and Mr. Yagy, and the loss of money, and so on, and all of that I am stricking from the record, that is out, it means nothing, and you are to ignore it." If you think there is an overlap to the pre-bank robbery gambling, I would be glad to clarify that.

MR. HOULIHAN: I would like that, your Honor. The second thing is with regard to the confession of Mr. Schwartz concerning the stabbing of Hook. There is no question, at least with regard to Mr. Schwartz, that at least one of the reasons for stabbing him was the bank robbery. My next witness will be the special agent that took that confession from Mr. Schwartz, and I ask the Court's instructions on how to proceed with that.

THE COURT: I don't know how you have now labelled the various pieces of Government's Exhibit 6. You might for the record say what they are.

MR. HOULIHAN: I have taken Government's Exhibit 6 and xeroxed each portion, and have labelled confession number one in Government's Exhibit 6 as Government's Exhibit 6(a), confession number two as Government's Exhibit 6(b).

THE COURT: All right. The three pairs of confessions, one pair dealing with the bank robbery, one pair dealing with the Wegman's robbery, one pair dealing with the stabbing --

MR. HOULIHAN: Yes.

THE COURT: I can't remember the sequence they occurred in. In each pair there was one statement where Mr. Schwartz implicated only himself, and the other member of that pair implicated others. How do they flow?

MR. HOULIHAN: I labelled them just as they appeared in Government's Exhibit 6.

THE COURT: I don't know the sequence. Which is the one, for example, wherein Mr. Schwartz talks about the bank robbery and implicates only himself?

MR. HOULIHAN: That is Government's Exhibit 6(a).

THE COURT: 6(a) can be used if properly shown, properly founded.

MR. HOULIHAN: Government's Exhibit 6(b) is where he implicates other people in the bank robbery. Government's Exhibit 6(c) is the Wegman's robbery implicating only himself. Government's Exhibit 6(d) is the Wegman's robbery implicating himself and others. Government's Exhibit 6(e) is his involvement with stabbing Ronnie Hook alone, and Government's Exhibit 6(f) is the next one where he implicates himself and Lord and Yagy in the stabbing.

THE COURT: All right. My instructions are that you may use 6(a) and may not use any of the others. Now, I have to say very frankly, and I don't think that that is a surprise to anyone, this matter of the stabbing has been one of great concern to me throughout the trial to this point, and before the trial, and I had great concern whether or not it should be permitted in the case at all because of its obvious high prejudice, as far as the defendants are concerned. This is not to say that if it had come in on a proper foundation that the prejudice against the defendants that attend such testimony would not have been legitimate. Obviously, any substantial evidence of criminality is prejudicial to the one against whom it bears. The question is whether it is improper prejudice. This matter of the stabbing has been borderline in my mind, has been of great significance in the case, if it is in. Consequently, and again going back to Mr. Hook's answer, I do not want to get into it at all at this point. I would not allow you, if you had asked, but you have not, if you had asked for an opportunity to impeach Mr. Hook on this point, as you are now allowed to do under the Federal Rules of Evidence, I would have denied you that right in my discretionary role. The stabbing is out, and we will not go into it at all. Bring Mr. Hook in prior to his being cross examined. The Government has indicated that its direct examination of Mr. Hook is now at an end.

MR. HOULIHAN: Your Honor, I wanted him to identify the photographs, if that is okay.

THE COURT: What photographs.

MR. HOULIHAN: Government's Exhibits 3 and 4.

THE COURT: How does he know anything about this?

MR. HOULIHAN: He could identify who is dressed in one outfit, which one is dressed in the other outfit.

MR. KREMER: Irrevelant, your Honor.

MR. HOULIHAN: We don't have any testimony on who was dressed in which outfit.

THE COURT: Aren't the outfits the same except one has a shotgun and one has something that looks like a hard object near the bag, which maybe a gun, otherwise, they have coveralls on and masks, don't they look the same?

MR. HOULIHAN: They look substantially the same, your Honor, yes, with some minor differences.

THE COURT: He indicated Mr. Lord and Mr. Schwartz went in the bank, they were dressed this way. I think it matters not at all that this figure in this photograph is one person as opposed to the other. I think you had better drop it right at this point.

MR. KREMER: Your Honor, would you make your clarification about ruling on the testimony on the gambling? You indicated that you were going to.

THE COURT: I am merely going to indicate to them that when I told them that all of the partnership gambling between Mr. Hook and Mr. Yagy has gone out, pursuant to my instructions, it didn't take out of the case the pre-bank robbery alleged partnership gambling.

MR. KREMER: Thank you.

THE COURT: Now, tell Mr. Hook, as I did before, that he should be careful to listen to the questions, to respond only to the questions, and not to be free wheeling, as the saying goes.

MR. HOULIHAN: Do you want me to --

THE COURT: No. Bring in Mr. Hook. One further thing while they are bringing him in. I have gone through the matters furnished to me pursuant to subpoena served -- well, at my order -- served upon the Sheriff's Office and the District Attorney, and I find in that nothing at all that is pertinent. There is one item provided to me by Mr. Karcich --

MR. KREMER: Mr. Karsch.

THE COURT: He wrote it out, K-a-r-c-i-c-h --

MR. KREMER: My apology.

THE COURT: -- of the Corporation Counsel's Office. There is one item in that reported by an officer in July and in connection with what is dealt with there, which is not the bank robbery, there is one statement, which I think I can read to you, you will know what it is, I think it means nothing, "During the DA interview with Hook, Hook stated that he and James Lord, Gerry Schwartz and possibly a third person, Gerry Yagy, had committed the above armed robbery at the Columbia Savings Bank." Now, there is nothing there except the word "possibly" for Mr. Colicchio, if he wants to somehow grab hold of that and make some use of it, he may.

MR. HOULIHAN: Was that a question and answer?

THE COURT: It is a narrative statement.

MR. HOULIHAN: By a police officer?

THE COURT: By a member of the Rochester Police Department. The material given to me by the Sheriff's Department, there is in there a statement made by Mr. Hook on July 17, 1976, but that deals only with the stabbing. I see nothing in there that relates to the bank robbery. There are some handwritten notes evidently made by Sheriff's investigators, and a sheaf of yellow paper with handwritten notes on them, and there is in there at one point one very brief reference saying that Mr. Yagy had told Mr. Hook that he had done job on the bank, and the implication — I think it said "Use him in other affairs." That is all I find in all of this material.

MR. KREMER: Thank you, your Honor.

MR. COLICCHIO: Thank you.

THE COURT: All right.

RONALD HOOK, called as a witness on behalf of the Government, and having been previously duly sworn, resumed and testified further as follows:

THE COURT: Mr. Hook, Mr. Houlihan is now finished his examination of you, and we go into cross examination where the attorneys representing Mr. Yagy and Mr. Lord and Mr. Schwartz, not quite in that order, will cross examine you. They will ask you questions and obviously there purpose is to try to —

THE WITNESS: I know their purpose, sir.

THE COURT: Sure. Listen to their questions, answer their questions. The only thing I don't want is using any of their questions — unless the question really asks for it — I don't want you to get into Wegman's or the stabbing.

THE WITNESS: Yes, sir.

THE COURT: Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: All right.

(Thereupon the jury entered the courtroom at 9:55 A.M.)

THE COURT: Of course, Mr. Hook, you continue under oath.

THE WITNESS: Yes, your Honor.

THE COURT: Good morning, ladies and gentlemen. When you come into the courtroom slightly after four o'clock yesterday we had our last series of questions and answers, I told you that I had made a certain determination then that evidence about certain gambling operations was going out of the case, and not to be considered. I refer to that as a partnership gambling supposedly going on with Mr. Yagy and Mr. Hook being partners. What I intended to put out of the case was the evidence about any such after the bank robbery. There was some evidence about that same type of gambling before the bank robbery, that is still in the case. All right, Mr. Kremer.

MR. HOULIHAN: No further questions.

CROSS EXAMINATION BY MR. KREMER:

Q. Good morning, sir.

A. Good morning.

Q. Mr. Hook, sir, you told us yesterday that for a time you were employed at a gas station?

A. Yes, sir.

Q. And the name of the gas station?

A. Columbo's Minute Man.

Q. That is located where?

A. Ridgeway and Dewey Avenue.

Q. How long were you employed there, sir?

A. Approximately three years.

Q. Approximately three years. Do you remember the dates when you began your employment and when you ended your employment?

A. No, sir.

Q. And do you recollect what your hourly rate -- were you paid by the hour or week?

A. By the hour, sir.

Q. How much was your hourly wage?

A. Well, it started at two dollars an hour, and it went to two fifty an hour, and at the end it was three dollars an hour.

Q. And at the time that you were last working, were you putting in on the average a forty hour week or less than that or more than that?

A. It varied because he wasn't certain when he would need me all the time. Toward the end it was on a full time basis though.

Q. So toward the beginning was pretty much on a part time basis?

A. Yes, sir.

Q. And during the years that you were working at the gas station, you lived at home?

A. Yes, sir.

Q. And did you drive a car during those years that you worked at the gas station?

A. Yes, sir, I usually drove my father's car. I did own a car of my own but I didn't have it very long.

Q. Now, you have told us that you worked at the gas station, you were left alone there a great deal of time, is that correct?

A. That is correct.

Q. And you told us that you went to John Marshall High School?

A. Yes.

Q. And you went to other schools, as well?

A. Yes.

Q. And you told Mr. Houlihan that your grades at Marshall were average?

A. Yes, sir.

Q. And that you left school at some particular point and started going full time on your own?

A. Working you mean?

Q. Yes.

A. Yes, sir.

Q. And you told Mr. Houlihan that you had not been suspended from school?

A. Yes, sir.

Q. Now, your duties at the gas station consisted of what, sir?

A. Pumping gas and making change with the money.

Q. I see. And did your gas station feature any mechanical work that you would do, anything like that?

A. No, sir.

Q. Your duties were to pump the gas, as you say, and take the customer's money?

A. Yes, sir, and put oil in the car or whatever.

Q. And put oil in the car or whatever. Now, you mentioned briefly that prior to this incident April, the bank robbery, that you did some gambling?

A. Yes, sir.

Q. Now, you did quite a bit of gambling, did you not?

A. Yes, sir.

Q. And you testified on direct examination, I believe you said that you reached a point where you were gambling every night?

A. Yes, sir.

Q. And this was during the year 1976?

A. Yes, sir.

Q. During January were you gambling every night then?

A. No, sir.

Q. February?

A. No, sir.

Q. March, sir.

A. Around March it started to get to the point where I would go more often, almost every night, maybe sometimes in a week every night.

Q. And prior to that you were gambling on a weekly basis, perhaps, during 1975?

A. I can't tell you exactly when I gambled and when I didn't.

Q. Fine. You haven't discussed your testimony here with anyone, have you, by the way?

A. Yes, I discussed it with Mr. Houlihan.

Q. Anybody else?

A. No, sir.

Q. Okay. Now, you indicated on your direct examination that there came a time when you met Gerald Nagy?

A. Yes, sir.

Q. And you said that you had met him approximately three years ago?

A. Yes, sir.

Q. And you actually started to work for him about a year ago, correct?

A. Yes, sir.

Q. Something like that?

A. Right.

Q. You also testified that you did not want to work for him?

A. At first, no.

Q. At first, no. But yet somehow you worked for him?

A. Yes, sir.

Q. And this feeling that you didn't want to work for him, how long did it last, if you recollect?

A. Not very long.

Q. Not very long. So there came a point — it's not that --

THE COURT: Wait a minute -- just answer the questions.

BY MR. KREMER:

Q. This particular feeling, can you recollect in time how long it lasted?

A. No, sir.

Q. But at some point you did want to work for Mr. Yagy?

A. Well, to tell the truth, sir, I did it as a favor to him. I never really wanted to, he talked me into it.

Q. I see. And you worked for Mr. Yagy for how long, sir?

A. I'm not sure. I delivered pizzas for him when he needed me. I asked him if he needed someone else to do it. Sometimes he did and I didn't deliver maybe a week or two, and he would ask me again to work for him.

MR. KREMER: Will you read the question back?

(Thereupon the last question was read by reporter.)

BY MR. KREMER:

Q. Do you understand the question?

A. How long?

Q. Yes. Do you understand that question that I asked, sir?

A. Yes, sir.

Q. Okay. Can you answer it?

A. No, sir. It was on and off I worked for Mr. Yagy.

Q. From what period of time, when did you first begin working for him?

A. Around January - February of 1976.

Q. '76 or '75?

A. '76.

Q. '76. But you had known him for three years before?

A. Yes, sir.

Q. And so it is your testimony then that during this period of time from January through April or May when you were working -- or April when you were working for Mr. Yagy, that you were doing it because he was talking you into it all the time, is that a fair statement?

A. I would say it is fair, yes, sir.

Q. And each and every time you delivered the pizza for him he talked you into it, is that correct?

A. No, sir.

Q. No. At least to some extent then it is your testimony that he talked you into doing these things, correct?

A. Yes, sir, I said that.

Q. And at no time did you tell him to go away, that you were not going to do anything for him, did you?

A. No, sir.

Q. Now, your gambling began approximately three years ago, didn't it, sir?

THE COURT: From today?

MR. [illegible]: From today, yes, sir.

THE WITNESS: No, sir.

BY MR. [illegible]:

Q. It began later or earlier than three years from today?

A. I don't recall the first time I ever gambled.

Q. This is February 1977, did your gambling begin during the year 1974?

A. It may have.

Q. All right. Gambling, I mean gambling among friends and small stakes.

A. Sure.

Q. 1974?

A. Possibly, I'm not saying for sure.

Q. All right. During 1974 you were a student at Madison High School?

A. No.

Q. You were a student where?

A. John Marshall High School.

Q. John Marshall High School, excuse

A. Right.

Q. You were in what grade at that point?

A. What year is this?

Q. 1974.

A. '74? Excuse me, I was a student at Greece Arcadia High School.

Q. All right. What grade were you in at Greece Arcadia?

A. I was a freshman.

Q. What number grade would that be?

A. Ninth.

Q. Then you transferred to Madison High School -- Marshall High School, I'm sorry?

A. Yes.

Q. And when did you transfer to Marshall High School, sir?

A. I don't recall. I believe it was the next year. In my sophomore year, my tenth year of high school, I was enrolled at John Marshall.

Q. Was it in September that you went to Marshall?

A. Yes, sir.

Q. And you were gambling while you were in Marshall High School, weren't you?

A. No, sir.

Q. All right. While you were a student at Marshall High School you engaged in gambling activities, not necessarily in the high school?

A. Yes, sir.

Q. You started gambling with, as you say, your friends for small stakes, correct?

A. Yes, sir.

Q. How small would you say was the small stakes at that time?

A. Oh, we played poker for quarters, twenty five cents.

Q. And you would win sometimes and you would lose sometimes, is that not correct?

A. Yes, sir, like everybody else.

Q. Sure. Can you recollect how much you might have lost at any one time during 1974, lost to your friends?

A. No, sir.

Q. Can you remember how much you might have won, your biggest win, during 1974?

A. No, sir.

Q. Can you remember how many times you played poker during that time, 1974?

A. No, sir.

Q. And can you remember whether you did it on any frequent basis or not?

A. I never did it frequently, sir.

Q. Is it a fair statement that your recollection for your poker playing during 1974 is a bit blank?

A. Yes, sir.

Q. Now, in 1975 you were in the tenth grade at Marshall High School, is that correct?

A. Yes, sir.

Q. And how long did you stay in school during that year?

A. I believe that was the year I dropped out, sir. I think it was October I dropped out.

Q. All right. Now, during that year, from September of 1975 through December of 1975, did you do any gambling then?

A. What year? Repeat the year, sir.

Q. Sure. September 1975 through December 1975.

A. Yes, sir.

Q. And was this with your friends again or were you with different people than your friends?

A. My friends.

Q. With your friends. What stakes were you playing for then?

A. Same stakes.

Q. A quarter ante?

A. Yes, sir.

Q. Did it go up to a half a dollar ante?

A. I think the last hand of the night we used to go all out and throw a half dollar in the pot.

Q. During that period of time, do you remember how much time you were playing, with what frequency?

A. I don't recall, sir.

Q. All right. Do you recollect how much you may have won, what your biggest win may have been?

A. No, sir.

Q. Do you recollect what your biggest loss might have been?

A. No, sir.

Q. Now, during 1975, during 1975 from January through December 1975, you were not in school, is that correct?

A. January 1975 to December 1975?

Q. Yes. Take your time.

A. Okay.

Q. Did you think of the answer?

A. Yes, I was in school at that time.

Q. Now, when did you start playing poker or cards with any other persons other than your friends?

A. In January or February of 1976.

Q. I see. And --

A. No, sir, I'm sorry, April or May of 1976.

Q. April or May of 1976. Well, when in April of 1976 did you start playing cards, if your recollect?

A. I don't. I don't recollect.

Q. It was in April of 1976, that is your testimony?

A. Approximately.

Q. Approximately. Could it have been March?

A. It could have been March. I don't remember exactly, I'm sorry.

Q. Okay. Is it a fair statement that your recollection for the events of your gambling and during the months of April and March of 1976 are a bit fogged?

A. Yes.

Q. You don't have a good recollection for them then, correct?

A. I recollect some of it. You know, like if you wanted me to give you every day on when I gambled, I couldn't do that, sir, I'm sorry.

Q. Do you remember what your big winnings, your biggest evening was when you were doing the gambling away from your friends with these other people?

A. Yes, sir, I believe I won $500 one night.

Q. You are not sure?

A. Yes, I am sure, it was $500.

Q. You're sure it was $500. What was your biggest loss during that period of time?

A. Now, are you talking about me gambling by myself?

Q. Yes, sir.

A. No partner, just by myself?

Q. Just by yourself. Take your time, sir.

A. I don't recall.

Q. Now, during this period of time, April of 1976, you were also working at the gas station, isn't that correct?

A. I know sometime around April 1976 my boss lost his business.

Q. I see. Can you help me out and tell me when he lost his business?

A. I don't remember exactly.

Q. Well, when your boss lost his business that put you out of work, didn't it?

A. Yes, sir.

Q. And your paycheck stopped, of course, didn't it?

A. Yes, sir.

Q. And I will ask you once again, maybe that may have jogged your recollection. Do you remember when in April of 1976 that you lost your job?

A. No, sir. It could have been March. I'm not sure, it was around the spring of '76.

Q. I see. It could have been sometime in March?

A. Possibly.

Q. Could it have been back as far as February?

A. No.

Q. Okay. Sometime in March or April of 1976?

A. Approximately, yes, sir.

Q. All right. And do you remember what your -- strike that. Do you recollect what you did for a living during that month of March or April 1976 after the gas station closed?

A. Yes, sir, I delivered pizzas for Mr. Yagy.

Q. And did you have any other income from a job?

A. No, sir.

Q. And do you recollect what Mr. Yagy was paying you during the time in April or March of 1976 when you were working for him?

A. Yes, sir, it was $10 a night.

Q. $10 a night. And you indicated before that you don't recollect how many nights you were working for him, correct?

A. Right.

Q. So that it would be a little hard to say at this point what your earnings were from him on a weekly basis during the months of April and March 1976?

A. Well, I didn't get paid very often, sir.

Q. I see. So that would make it more difficult to figure out what your earnings were?

A. Yes, sir.

Q. Now, when you say that Mr. Yagy -- I am assuming, correct me if I am wrong -- you are saying that Mr. Yagy didn't pay you very often, is that correct?

A. Yes, sir.

Q. All right. And can you recollect with what frequency he paid you during the months of March and April 1976?

A. No, sir.

Q. All right. Well, during the months of March and April of 1976 you were living at home, weren't you?

A. Yes, sir.

Q. And you were driving your father's car, weren't you?

A. Occasionally.

Q. Occasionally. What else did you use for transportation if you didn't have you father's car?

A. I walked.

Q. You walked. Didn't have any means of getting around?

A. What time is this?

Q. March and April of 1976.

A. Yes, sir, I believe I had a car, my own car, during that time.

Q. What kind of car was it, sir?

A. 1971 Monte Carlo.

Q. Who makes Monte Carlo's?

A. General Motors.

Q. Which division of General Motors?

A. Chevrolet.

Q. It was a 19 -- what year?

A. '71.

Q. 1971 Chevrolet, what color was it?

A. Gold.

Q. And this was your car?

A. Yes, sir.

Q. And when did you buy it, if you recollect?

A. I believe it was in January.

Q. Of 1976?

A. '76.

Q. You said you believed, could it have been possibly December?

A. Possibly.

Q. It could have been even February of 1976?

A. I believe I had the car in February.

Q. All right. At least it was possibly December of '75 or January of 1976 that you bought this car, correct?

A. Yes, sir. I didn't pay for the car all at once. I bought it from a friend, he would take $25 at a time. I paid $300 for the car.

Q. Fine. And you insured the car?

A. My father insured the car.

Q. You looked puzzled, you are not sure at the point, is that correct?

A. I had my father insure the car.

Q. I'm sorry, I see. And do you know who he insured the car with?

A. I'm not sure of the company.

Q. Do you know how much the premium was?

A. No, sir. It was just a -- it was additional to what he paid.

Q. Additional to what he paid?

A. Yes, sir. I don't know exactly what it was.

Q. Do you recollect having any discussions with him about paying for the insurance on the car?

A. No, sir, because the car only ran for a week and it broke down.

Q. I see. You indicated though that you had an arrangement with this friend, that you paid this friend so much, you would pay him like $25 a week or a month thereafter, that is what you told us just a few minutes ago?

A. No, sir, I paid him in full before I received the car.

Q. You didn't pay him $25 a week or $25 a month?

A. I don't know what the payments were.

Q. Well, is there any question, Mr. Hook, that you did say just two minutes ago that you paid him so much down and $25 a week or a month?

A. I said possibly $25.

Q. I see. Now, at this point your testimony is that you are really not sure as to what the arrangements were for the purchase of this automobile, is that correct?

A. I told you that I paid it off. Every now and then I would give him so much money. How much money at one time I gave him I don't recollect.

Q. But the payments were made over a period of time, is that correct?

A. Yes, sir.

Q. All right. Now, you said that the car broke down after a week, is that now correct?

A. Yes, sir.

Q. And did you still continue to pay for the car after it had broken down?

A. I was already paid up --

Q. I see.

A. -- in full.

Q. I see. So that it is your statement -- is it a fair statement that you were paying him so much, and when you finally paid him in full then you took the car?

A. Yes, sir.

Q. Can you recollect when you first started making payments for the car?

A. No, sir.

Q. All right. Can you recollect over what period of time the payments for the car stretched over?

A. No, sir.

Q. This was your first car, wasn't it, Mr. Hook, sir?

A. Yes, sir.

Q. You had never owned a car before, had you?

A. No, sir.

Q. It must have been a disappointment for you when the car broke down?

A. It was, I was disappointed.

Q. Did you get another car during this period of time, from January 1976 through April 1976?

A. No, sir.

Q. So that your only means of transportation then during this period of time were, as you have testified, your father's car and walking?

A. Yes, sir.

Q. You didn't use any other means of transportation during this period at all?

A. No, sir, not that I can remember.

Q. That is all the way through April of 1976?

A. Yes, sir.

Q. Fine.

A. Up until this present date.

Q. We are not going to talk about this present date. Thank you, though. Now, during the period of January 1975 through -- I'm sorry, through the period of January 1976 through April of 1976, you were dating, weren't you?

A. Dating?

Q. Going out with ladies, girls?

A. I don't recall any date during that time.

Q. Do you recollect being with any girl around your age for a date during that period of time?

A. No, sir.

Q. Okay. Do you recollect any of your social activities during the period of January 1976 through April 1976?

A. Yes, sir, mostly going out and gambling.

Q. Mostly going out and gambling. Did you ever stop and go to the movies or a drive-in restaurant, things like that, during this period of time?

A. Movies or a drive-in restaurant?

Q. Yes, sir.

A. Not that I remember, sir.

Q. You didn't have a particular spot that you would go to to have a coke or a soda, anything like that?

A. Oh, yes, next door to -- across the street from my old place of employment there was a restaurant, I would go in there frequently.

Q. What was the name of that restaurant?

A. Corfu Restaurant.

Q. So you didn't, according to your statement then -- correct me if I'm wrong -- you didn't do much socializing during the period of January 1976 through April 1976?

A. That is correct. Not much at all, as far as dating.

Q. Not much at all?

A. None at all.

Q. During that period of time you were gambling?

A. Yes, sir. That was mostly what I would be doing.

Q. Again, your testimony is that you do not recollect what the high pots were that you ever won by yourself, other than the $500, correct?

A. Yes, sir.

Q. You don't recollect what the most is that you ever lost at one time by yourself?

A. Yes, sir, I don't recollect.

Q. Do you recollect during that period of time what your cumulative losses totalled to by yourself? Take your time.

A. You mean a debt, sir, or all the money I have lost?

THE COURT: How did you make out through this gambling period, did you win, lose, if so, how much?

THE WITNESS: I don't remember.

BY MR. KREMER:

Q. You don't remember.

A. I told you that earlier.

THE COURT: I'm not talking about a single time. During the course of your gambling were you a winner, a loser, if so, how much?

THE WITNESS: Well, most of the time I would lose.

BY MR. KREMER:

Q. All right.

A. Most of the time everybody loses, I guess.

Q. Fine. Do you recollect, sir, as Judge Elfvin just asked you, do you recollect what your total losses were?

A. No, sir.

Q. You don't. But as you have just indicated though, you were a loser?

A. Yes, sir.

Q. As are lots of people?

A. Yes, sir.

Q. Now, these games that you were playing, what kind of cards were you playing?

A. This was Black Jack.

Q. And this was not with your friends, you were not with your friends then, were you?

A. No, sir.

Q. And it is a fair statement that the people that you were playing cards with were professional gamblers, weren't they?

A. Yes, sir. They have been at it much more than me, I was new.

Q. I'm sorry.

THE COURT: He said they had been at it much more than he had.

THE WITNESS: Most of the gamblers in there were older, I mean much older.

BY MR. KREMER:

Q. Now, these people that you were playing cards with, they wanted you to pay up, didn't they?

A. I always paid up.

Q. Yes. They wanted you to pay up, didn't they?

A. Oh, yes.

Q. You couldn't walk away and say, 'Gee, it has been a nice day. I realize I owe you this money, let's forget about it,' you could not do that?

A. If you were well known you could have. I wasn't very well known.

Q. You had to pay them up, correct?

A. I did, yes. Many people could borrow, put it off, this depends on the agreement they had between themselves.

Q. You had to pay off, correct?

A. Yes, sir.

Q. So that means that you had to get money from someplace to pay these people off, correct?

A. I never was in debt with these people. No, sir, you are wrong.

MR. KREMER: Excuse me. Would you read that last question?

THE COURT: I think he answered it.

BY MR. KREMER:

Q. You had to get some money from somebody to pay off the debt, right?

THE COURT: He said there wasn't any debt.

THE WITNESS: There wasn't any debt when I gambled by myself, sir.

BY MR. KREMER:

Q. Then somebody assumed responsibility for your debts?

A. I was never in any debt. If I lost money, I had it with me, that is the money I lost. I never went further on credit.

Q. I see. How much would you carry into the gambling place that you frequented during the months of February through

April 1976? How much would you carry in with you at any one time?

A. I don't recall, sir.

Q. Could have been a thousand dollars?

A. No, sir.

Q. More or less?

A. Much less.

Q. Five hundred?

A. At that time, sir, I wasn't gambling on my own.

Q. We are talking about -- in other words, your testimony is that during this period of January through April of 1976 that you were not gambling on your own at all?

A. No, sir, I'm sorry, I'm wrong. Most of the time during that period I had a partner. I may have gone in by myself.

Q. We are not talking about your partner. I want to direct your attention to your --

THE COURT: You wanted to know how he was gambling during that period, that is partially an answer.

MR. KREMER: Excuse me, your Honor.

MR. HOULIHAN: I couldn't hear the answer.

MR. KREMER: My apologies to you, Mr. Houlihan. Read the question back and have the gentleman answer it.

(Thereupon the reporter read as follows:

"Q. We are talking about -- in other words, your testimony is that during this period of January through April of 1976 that you were not gambling on your own at all?")

THE WITNESS: During January, February, March, I did no gambling on my own. In April I may have done occasional gambling on my own, not much.

BY MR. KREMER:

Q. So that your gambling was always with a partner, correct, during that period of time?

A. Mostly with a partner. I just explained to you that occasionally I went in there by myself.

Q. Well, let's deal with these occasional periods of time that you went in there by yourself.

A. Occasionally my partner -- well, the first time I would sit in these games, he would let me sit, take his chair, and show me, let me get the feel of the game.

Q. Mr. Hook, please. During the occasional times when you gambled by yourself, without your partner, can you tell me, first, how many times this consisted of?

A. No.

Q. No. And can you tell me during that period of time whether you walked into these gambling places with any money or not?

A. Yes, sir, I walked in there with money.

Q. All right. And now, getting into that, did you walk in there with say $500?

A. No, sir, absolutely not.

Q. Did you walk in there with $100?

A. No, sir.

Q. Did you walk in there with like $10?

A. That's closer.

Q. So that you would go into these gambling places and you would play your $10 or so, and if you lost it, you wouldn't play any further, correct?

A. Yes, sir.

Q. And again, during the month of April 1976, you can't tell me with what frequency you gambled by yourself, can you?

A. No, sir.

Q. Now, Mr. Hook, I am going to ask you to go back to the events of 1975, and I am going to ask you specifically about John Marshall High School. Now, you told Mr. Houlihan that you had not been suspended, correct?

A. Yes, sir, not to my recollection.

MR. KREMER: Would you mark this exhibit for me, sir?

(Thereupon document referred to was marked Defendant's Exhibit 5 for identification.)

BY MR. KREMER:

Q. You were suspended from high school, weren't you?

A. John Marshall?

Q. Yes.

A. Not that I can remember, sir.

Q. You were suspended for fighting, sir, weren't you?

A. One time during —

MR. KREMER: Excuse me, sir. Would you read the question back?

(Thereupon the last question was read by reporter.)

THE COURT: Do you want a yes or no?

MR. KREMER: Yes.

THE COURT: Answer it yes or no.

THE WITNESS: I can't answer it yes or no, sir.

BY MR. KREMER:

Q. Did you ever live at 38 Ridge Road, West?

A. Yes.

Q. Is your father's name Nicholas Hook?

A. Yes, sir.

Q. I am going to ask you to look at Exhibit 5, a letter from John Marshall High School, addressed to Nicholas Hook, and ask you if you would read it and see if it refreshes your recollection as to whether you were suspended from John Marshall High School.

A. This incident, sir, I thought that me and the dean in school had an agreement that he would call my father and talk to him, I didn't know he suspended me.

Q. Is it a fact, sir, that you were suspended during May of 1975?

A. According to this, yes.

Q. All right. But it is your testimony, sir, that you didn't know at the time that you were suspended?

A. Yes, sir.

Q. Nobody told you?

A. Yes, sir, that's right.

Q. And you just -- May 1975 is when you had left school, was it not?

A. No, sir.

Q. When did you leave school?

A. It was in October, October '76, maybe September '76.

THE COURT: 1976, Mr. Hook?

BY MR. KRIMMER:

Q. Do you remember, sir?

A. '75. '75, October or September. I know it was the beginning of the year.

Q. You are guessing though, aren't you, sir?

A. (No response.)

MR. KREMER: No answer. Would you mark this?

(Thereupon document referred to was marked Defendant's Exhibit 6 for identification.)

BY MR. KREMER:

Q. Mr. Hook, you told Mr. Houlihan and you told me on cross examination that at the time you left Marshall that your grades were average, correct?

A. Yes, sir, C's, D's, average.

Q. I am going to show you Exhibit 6 for identification, a secondary school record, purporting to show your grades during 1974-1975, and I ask you to look at that, look that over, and see if it refreshes your recollection as to what your academic record actually was.

A. This is failing.

Q. How many E's are there on that record?

A. Four.

Q. How many D's are there?

A. One.

Q. How many C's are there?

A. Three.

Q. Final marks, look in the final mark column. How many E's are there?

A. Four E's and a D.

Q. No C's?

A. No, sir.

Q. Mr. Hook, you didn't lie to Mr. Houlihan about your grades, did you?

A. I was referring to my grades during high school, also referring to my grades during ninth grade.

Q. I --

A. At Greece Arcadia they were average, sir.

Q. You were not lying about your being suspended from school, were you, sir?

A. I didn't understand it as a suspension, so I wasn't lying, I was misled.

Q. Who misled you, sir?

A. I don't recall.

Q. All right. Now, you told us there come a time when Mr. Yagy told you that he wanted you to do a job for him relating to the bank robbery which you have testified to?

A. Yes, sir.

Q. And when did that conversation take place, what date was that?

A. Approximately four or five days before the actual bank robbery occurred.

Q. All right. And where did that conversation take place?

A. In the front of his store, sir.

Q. Where is his store located?

A. Dewey Avenue, sir, near Ridgeway.

Q. How long did that conversation last?

A. I would say fifteen, twenty minutes, sir.

Q. You're pretty sure of that, aren't you?

A. Yes, sir.

Q. Sure. And you are pretty sure it was three or four days before the robbery?

A. Four or five days before the robbery, sir.

Q. All right. Now, you just told me when we started the cross examination that you had discussed your testimony with Mr. Houlihan and with no other person, do you remember that statement?

A. Yes, sir.

Q. Now, you certainly discussed your testimony with members of the FBI, didn't you?

A. Yesterday, are you talking about yesterday sir?

Q. I am talking about this whole period of time.

A. Yes, sir, I did.

Q. Sure. How many FBI agents did you talk to?

A. Just one, sir.

Q. Just one. And you talked to your parents about this, didn't you?

A. No, sir.

Q. No? So that at least when you told me that the only person that you had talked to was Mr. Houlihan, that was a slight inaccuracy, you actually talked with somebody else?

A. Yes, sir.

Q. All right. Now, you have told me and you told Mr. Houlihan on direct examination that Mr. Yagy had told you about this bank job, and you specifically testified that you did not want to do the bank robbery?

A. I testified that I agreed to do the bank robbery.

Q. Didn't you say that you didn't want to do it?

A. At first I didn't.

Q. At first?

A. Yes, sir.

Q. Did you tell that to Mr. Yagy, that you didn't want to do it?

A. Not in so many words. I said to him it can't be done, it is impossible. He assured me how easy it would be, then I agreed after some more conversation.

Q. That conversation, you are certain it actually took place, that you have just testified to?

A. Yes, sir.

Q. Now, at that point you didn't go to the police and tell them that a bank robbery is going to take place, you want to cooperate as a law abiding citizen and tell them about it, you didn't do that?

A. Absolutely not, sir.

Q. No. You said, "Absolutely not," there is —

A. Meaning there is no doubt in my mind that I didn't go to the authorities and tell them.

Q. Okay. Actually, you wanted to participate in this bank robbery, did you not?

A. I did it, so I guess you could say yes. I did it.

Q. You wanted the money, did you not?

A. I needed the money.

Q. You wanted the money, did you not?

A. I needed the money.

Q. You needed the money because --

A. I had a debt at that time.

Q. You had a debt. What kind of a debt did you have, how much did you owe?

A. I owed approximately $400.

Q. And for $400 you were willing to perform a bank robbery to absolve yourself from that debt, correct?

A. Yes, sir.

Q. If you wanted $400 couldn't you have gone to your family for that money?

A. Yes, sir.

Q. You didn't go to your family, did you?

A. No, sir.

Q. Do you ever recollect telling the members of the press at any time that you played a lot of high stakes Black Jack?

A. Yes, sir.

Q. You told them you won a lot of money and lost a lot of money, do you recollect telling them that, the members of the press?

A. Yes, sir.

Q. Do you recollect telling them that you liked clothes and things like that, you wanted to spend money on that?

A. Yes, sir.

Q. Do you recollect what your clothing budget was during the months of January 1976 through April 1976?

A. I never — I didn't have money to buy clothes until April 10th of 1976. If you want to know my budget after April 10th, I can tell you.

Q. No, we are talking about the period prior to April 10th.

A. At that time I didn't dress in flashy clothes, I wore what I had, which wasn't much.

Q. You never tried to obtain other work, other than the gas station, did you?

A. Yes, sir.

Q. You did. Somehow you didn't connect up with it, did you?

A. Yes, sir, I had a job later in a glass factory.

Q. We are talking about the period up until the gas station closed.

A. Oh, yes, sir, I went to a railroad in Bergen and asked for a job there.

Q. You were a big gambler, weren't you? Yes or no, sir.

You were a big gambler, weren't you?

A. No.

Q. You were not?

A. Considering the people that I was gambling with, they were bigger.

Q. They were bigger. You owed a lot of money, did you not?

A. I owed approximately $400.

Q. Not a penny more?

A. I said approximately.

Q. Could it have been $4,000?

A. Absolutely not, sir.

Q. Positive about that?

A. Positive.

Q. $3,000?

A. No.

Q. Positive about that?

A. Positive.

Q. Your positive it wasn't over $500?

A. Yes, sir.

Q. $500 was the absolute ceiling that you owed, correct?

A. Yes, sir.

Q. Now, is it not a fact that you were taking money from the cash register of your boss to finance your gambling forays?

A. Stealing money, sir?

Q. Borrowing it.

A. Yes, sir.

Q. All right. How much did you borrow from your employer to finance your gambling?

A. One night I borrowed $60, and returned it the next morning.

Q. All right.

A. Another night I borrowed $75, returned it the next day. This wasn't for my gambling loan.

Q. Fine.

A. It was somebody else and me.

Q. Not Mr. Yagy though?

A. Yes, Mr. Yagy.

Q. You were borrowing money to help finance Mr. Yagy's gambling, too?

A. Yes.

Q. Now, you have talked about two separate nights that you had borrowed money from the cash register. Did you borrow any money on any other nights?

A. Yes, I believe I did borrow money more than two times.

Q. Could it have been twenty times?

A. No, sir.

Q. Could it have been ten times?

A. I would say closer to seven or eight times.

Q. Seven or eight times?

A. Yes, sir.

Q. And on the other five or six occasions, Mr. Hook, will you tell the jury how many dollars you borrowed on each separate occasion?

A. I don't remember.

Q. Can you give me an accurate total of those other five or six nights?

A. Combined?

Q. Yes, sir, an accurate.

A. $250, that is approximate.

Q. You paid every penny of that back?

A. Yes, sir.

Q. You didn't keep one cent of that from your boss, did you?

A. No, sir.

Q. And other than that $250 which you borrowed, plus the additional eighty or seventy and the other amount that you testified to, there were no other monies borrowed from your boss?

A. No, sir, not for gambling.

Q. Not for gambling. Did you borrow monies for other things?

A. Well, if there came a time when I needed to get lunch accorss the street, my boss would occasionally let me borrow two, three, five dollars.

Q. On how many occasions did you borrow money from your boss?

A. Oh, I would say throughout the three years I have known him and worked for him, he always let me borrow money. I have always paid him back.

Q. Sure.

A. On time.

Q. Can you give me any idea what the total amount of those borrowings from your boss was?

A. No, sir.

Q. So during this period of time that you worked for him there were two separate loan accounts; one with him personally, and one which he didn't know about, correct?

A. No, sir.

Q. He knew about the nights when you would take the money out of the register and put it back the next day?

A. Yes, sir, I told him.

Q. You told him after or before?

A. After.

Q. After. On each and every one of those seven or eight occasions, it is your testimony that you would borrow the money at night and the next morning you would tell him that you had borrowed the money from the register and you were paying it back?

A. Sometimes I would just give it back and not say anything. Sometimes I have given it back and told him I borrowed this sum of money. I paid it back on time.

Q. In essence, there were three loan accounts; one loan account with him directly for things like lunch money and casual money, another loan account with him during the night time for these sixty or seventy dollars, whatever amount, for gambling, and then the third account where you would take the money and put it back the next day without telling him, correct?

A. Yes, sir.

Q. Now, with respect to each and every one of these three loan accounts, everyone was paid on time, was it not?

A. I can't -- once I borrowed the money from the station in the morning, I couldn't return the money at seven, at opening time, I stayed at the gas station and I explained to my boss what happened. I told him that I would have the money by that day, and I did bring it back. He understood.

Q. Do you remember what day that was?

A. No, sir.

Q. That was a fairly -- well -- now, did you have a fourth loan account consisting of not a loan account but a stealing account from your boss?

A. No, sir, absolutely not.

Q. Absolutely not. Now, what about your parents, you got money from them, did you not?

A. Occasionally my mother would give me a few dollars when I was -- let me borrow it.

Q. How often would your mother give you a few dollars?

A. Once a week.

Q. Once a week. How much did that money consist of on a weekly basis?

A. She might give me ten dollars one week, five dollars the next week, I don't know.

Q. Would you pay her back?

A. Yes, sir, when I got my check.

Q. You never stole any money from her purse and not tell her about it?

A. No, sir.

Q. Did you have a loan account with your father?

A. No, sir.

Q. Did you have a loan account with any of your brothers or sisters?

A. Yes, sir, my sister used to let me borrow money from time to time.

Q. How much did you borrow from your sister?

A. Oh, twenty dollars, ten dollars, not often, once in a while.

Q. I beg your pardon?

A. Not often.

Q. Do you recollect how much in all you borrowed from her?

A. No, sir, I can't.

Q. Do you recollect in all how much you borrowed from your mother?

A. No, sir.

Q. Now, on occasion you would sometimes sell things to raise a few dollars, wouldn't you?

A. No, sir.

Q. On occasion you would borrow things and put them into hock and redeem them later, wouldn't you?

A. Borrow what things?

Q. Objects, razors or other property, and put it up and get money and borrow against it?

A. I don't understand. I don't understand what you mean, would you explain that.

Q. Do you know what the word to pawn means?

A. Yes, sir.

Q. All right. Have you ever pawned anything?

A. No, sir.

Q. Never. Now, all the money that you were borrowing from your sister and borrowing from your mother and borrowing at night fromyour boss was being used to finance your gambling sessions, correct?

A. No, sir.

Q. It was being used to do what then, what were you doing with it?

A. Used for subsistence, living, eating. Some of it was gambling.

Q. You were living at home during this period of time, were you not?

A. Yes, sir.

Q. You had a roof over your head?

A. Yes, sir.

Q. You had meals that were served to you, correct?

A. I wasn't home to eat often, I ate out.

Q. Do you recollect how often you ate out during the period of January 1976 through April 1976?

A. I never ate lunch at home, I never ate breakfast at all. If anything, I would eat dinner at home, not all the time.

Q. Do you recollect with any frequency how often you would eat out during the evening during that period January to April 1976?

A. In the evening?

Q. Yes, sir.

A. Two or three nights a week, I don't know.

Q. Are you sure or do you just think?

A. I'm guessing.

Q. Fine. In any event, there came this time when Mr. Yagy, you say, told you about the coming bank robbery, this was going to provide you with an opportunity to expunge your four or five hundred dollar debt, correct?

A. He told me, "This will give you a chance to get even with me, you will have plenty of money for yourself."

Q. How much money for yourself were you going to have in dollars, can you tell me at this point?

A. How much money did I receive?

Q. How much money were you going to get after the discussion?

A. He told me $75,000.

Q. That you were going to get for yourself?

A. Yes, sir, my share.

Q. Your share was going to be $75,000?

A. Yes, sir, he said if the armored car dropped the money off as scheduled.

Q. That is a lot of money, isn't it?

A. Oh, yeah, to me it is anyway.

Q. Now, again, as you testified on direct examination, you told us that you did not want to do the bank robbery?

A. Yes, sir, I said that at first.

Q. You said that at first?

A. Yes, sir.

Q. Now, there came a time when you met a man who you first identified as Eddie O'Brien?

A. No, sir.

Q. You never met an Eddie O'Brien?

A. No, sir.

Q. You never met a man by the name of O'Brien?

A. O'Brien, yes; Eddie, no.

Q. What was O'Brien's first name?

A. Jimmy.

THE COURT: We will recess at this point. Take a brief recess, ladies and gentlemen.

(Thereupon the court was in recess at 11 A.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 11:10 A.M.

(Defendants present, counsel present, jury absent.)

RONALD HOOK, called as a witness on behalf of the Government, and having been previously duly sworn, resumed and testified further as follows:

(Thereupon the jury entered the courtroom at 11:12 A.M.)

CROSS EXAMINATION BY MR. KREMER (Cont'd.):

Q. Mr. Hook, sir, you recollect that before the break we were talking about a man by the name of O'Brien?

A. Yes, sir.

Q. Of course, this is the man that you have subsequently pointed the finger at over in the direction of my client, Mr. Lord, and you said O'Brien and Lord were one in the same?

A. Yes.

Q. That is what you say. When you met O'Brien at some point, he didn't come up to you and say, 'Hi, I am James Russell Lord, Jr.,' did he?

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A. No.

Q. And the man that you met, the man you met that you say is O'Brien and James Russell Lord, Jr. are the same people?

A. Yes, sir.

Q. Now --

A. As I knew him.

Q. Now, you testified that there came a time after the bank robbery when you were in an automobile and you were in the back of an automobile, and you had been told to keep your head down?

A. Yes, sir.

Q. And that vehicle then proceeded, and you testified you did not know where it was going, correct?

A. Yes, sir.

Q. All right. Then there came a time when you suddenly realized that you were on Main Street, East, correct?

A. No, sir.

Q. No?

A. Main Street, West.

Q. I'm terribly sorry, Main Street, West. You recollect you were on Main Street, West?

A. Yes.

Q. Near what intersection?

A. I believe it was near Fites Square, if you know where that is.

Q. Fites Square?

A. Yes.

Q. You then recollect that you heard the siren of a police car?

A. Yes,sir.

Q. And which way was the police car going?

A. The same direction we were, sir.

Q. I see. In other words, it was behind you and it overtook you?

A. Yes, sir.

Q. Which way did it go after it overtook you?

A. Proceeded straight on Main Street, as far as I can remember. I ducked back down.

Q. You did not follow the car?

A. With my eyes.

Q. With your eyes. You then testified there came a time when you came near the Americana?

A. Yes, sir.

Q. And you then testified that the car was parked directly across the street from the United States Court House?

A. The parking lot across the street from the -- the Americana and the Federal Building are next to each other. I don't know if the parking lot was directly across from the Federal Building or directly across from the Americana. I believe it was the Federal Building, I'm not sure, sir, I'm sorry.

Q. It was a parking lot that the car pulled into?

A. Yes.

Q. Did the car park in the front of the parking lot or the back of the parking lot?

A. I don't remember.

Q. You then testified that you recollected that you then walked into the Americana, and that the man who you identified as Schwartz walked ahead of you?

A. Yes.

Q. That was your testimony?

A. Yes, sir.

Q. You also testified that the man you identified as Mr. Lord, he also walked ahead of you?

A. No, sir, he walked with me.

Q. He walked with you?

A. Yes, sir.

Q. And he was on your left side?

A. I don't remember.

Q. You don't remember. In any event, you do recollect that Schwartz walked ahead of you and Lord was walking with you, the three of you walked into the Americana?

A. Yes.

Q. Then you testified that you and the man you identified as Mr. Lord were waiting at the elevator for Mr. Schwartz to get the key?

A. Correct, yes, sir. We were at the elevator waiting for Mr. Schwartz, he had to go to the desk to get the key --

Q. And --

A. -- go to the desk to either check in or get the key. He did go to the desk. I don't know what his purpose was, I wasn't at the desk with him.

Q. He came back, and you and the man you identified as Lord were at the elevator?

A. Yes.

Q. The three of you went up in the elevator to the fifth floor?

A. No, sir, they went up ahead of me. I walked one flight of stairs, then took the elevator to the fifth floor.

Q. I see. Now, on your direct examination yesterday do you recollect testifying that the man who you identified as Lord and the man you identified as Schwartz went up separately and then you walked up one floor and took the elevator, do you remember that testimony yesterday?

A. No, I just refreshed my memory on that.

Q. And at some point you indicated that Schwartz -- the man you identified as Schwartz and the man you identified as Lord were at the fifth floor, correct?

A. That is the floor of the room we were in. I don't remember.

Q. How did you find the room at that point?

A. I knew the room number. I don't know it now, it slipped my mind.

Q. I see. In other words, at the foot of the elevator then while you were waiting with the man who you identified as Lord there came a time when the man you identified as Schwartz said the room number was such and such?

A. I don't remember who told me the room number.

Q. So that at that point Schwartz -- the man you identified as Schwartz -- and Lord got on the elevator, you walked up a flight of stairs, got on the elevator on another floor, and went up to the room, number which you can't recollect at this point?

A. Yes.

Q. You tapped on the door and they opened the door for you?

A. Yes.

Q. And you walked in and you saw the money?

A. Yes, sir.

Q. A lot of money?

A. Yes, sir.

Q. Now, you didn't know at that point how much money had been taken, did you?

A. No, sir.

Q. So you had expectations of receiving $75,000 at that point, did you not?

A. No, sir, because it was obvious that there was not $75,000 on the bedspread. It was obvious the armored car didn't make its rounds or whatever.

Q. I see. You are this experienced in looking at piles of cash that you could tell there wouldn't be enough for your $75,000, correct?

A. It's not a matter of experience, it's a matter of judgment.

Q. In your judgment then it didn't appear as if there was going to be your $75,000?

A. No, sir, there were mostly ten dollar bills, five dollar bills, one dollar bills, very few hundred dollar bills.

Q. Do you recollect how many packages of money you saw on the bed?

A. No, sir.

Q. And you said -- correct me if I am wrong -- there was no conversation going on while the money was being counted?

A. No, everybody was busy sorting out money, counting it. If there was conversation, I don't remember what the conversation was.

Q. So if I were to say -- or if I were to say to you --

A. I told Mr. Schwartz his voice was loud.

Q. Excuse me, sir. If I were to say to you it is my recollection -- strike it. Let me ask you this. Do you recollect saying there was no conversation going on while the money was being counted, do you recollect saying that?

A. No, sir.

Q. Okay, fine. Do you recollect saying that Schwartz, the man you identified as Schwartz, was loud?

A. Yes, sir.

Q. And he was singing a song, I believe you described?

A. No, sir, he was talking back to Lord.

Q. Talking back to Lord?

A. Yes, "Here, you count the fives." I told him to keep his voice down, there was a maid in the hall vacuuming. I told him to please keep it down.

Q. I see. And the money counting was going on during this period of time?

A. Yes, sir.

Q. And you told the man who you identified as Schwartz to keep it down?

A. Yes, sir.

Q. Do you recollect what you would have told him, other than keep it down?

A. No, sir.

Q. Do you recollect what the man who you identified as Mr. Schwartz said to you when you told him to keep it down?

A. He didn't say nothing.

Q. Did he keep it down?

A. Yes, he was a little more conscious that his voice was getting louder, and the best thing for him was to lower his voice so no one would hear us.

Q. You were conscious --

A. Then he turned the TV on, they turned the TV on loud.

Q. Who turned it on?

A. Mr. Schwartz.

Q. The man you identified as Mr. Schwartz turned the TV on?

A. Yes.

Q. You didn't testify to this on direct examination about the TV set?

A. No, sir, you just refreshed my memory on it. You went into more detail, I just remembered it.

Q. Now, the TV set was turned on, do you recollect what program was on?

A. No, I wasn't watching TV at that time.

Q. What were you doing?

A. I was sorting out money myself.

Q. When you say "sorting out money," what process was going on, tell me what you were doing when you say "sorting out money"?

A. Getting the ones together and the fives together.

Q. In other words, you put the ones in one pile, the fives in one pile, the tens in one pile, and the twenties in one pile?

A. Yes, sir.

Q. You would help to arrange them into piles of the same denominations of currency?

A. Yes, sir, I was experienced in doing that.

Q. You were experienced in doing that?

A. Because I worked at a gas station where I handled a lot of money on Friday night or something, I was very fast counting money.

Q. Very fast at counting money?

A. Yes, fast enough, I guess. I was out of there within a half hour, the money was counted by then.

Q. You indicated, sir, that you left the Americana because you were feeling ill?

A. No, sir, I left because I was scared. I was feeling ill but that isn't the reason I left.

Q. It is your testimony that you left because you were scared?

A. Yes.

Q. What specific thing were you scared of?

A. Scared of getting caught for what I have done.

Q. You were not too scared though to help count out the money, were you?

A. No.

Q. You were not too scared to tell the man you identified as Schwartz to keep quiet or shut up?

A. I was scared when I told him that. I was scared someone would hear the conversation. That should tell you I was scared, sir.

Q. Okay. Now, you indicated that there came a time when you went to see Mr. Yagy, the man you identified as Mr. Yagy?

A. Yes, sir.

Q. And how did you get to Mr. Yagy's house?

A. Took a bus, sir. The Lake Avenue bus takes you right up there.

Q. You have taken the Lake Avenue bus before?

A. Yes.

Q. And you had taken it several times prior to this bank robbery, hadn't you?

A. Yes, sir.

Q. So that your statement originally when I asked you about an hour ago if the only form of transportation you took during the months of January 1976 through April 1976 were your feet and your automobile, you indicated those were the only ones?

A. Yes, sir.

Q. You told me that before?

A. Yes.

Q. You were using the bus during that period of time, weren't you?

A. No, sir. As a matter of fact, that is the first time I have taken a bus in quite a while. I have had the experience of taking a bus before several times.

Q. But prior to January of --

A. Prior to January of 1976.

Q. So that your testimony that the only transportation you used during that period of January 1976 and April '76, i.e., your feet and the automobile, is substantially correct, correct?

A. No, sir, I took the bus. That would make it incorrect, am I right?

Q. Now, you testified that there came a time when you got to the bus stop and you were met at the bus stop by the man you identified as Mr. Yagy, correct?

A. He was across the street on the corner.

Q. He was across the street on the corner?

A. Yes, sir. The bus was on the right hand side of the street, he was on the left hand side of the street.

Q. I am going to direct your attention -- I am going to ask you if you recollect testifying before a grand jury?

A. Yes, sir, I do.

Q. Convened by this particular court?

A. The U.S. District Court?

Q. Yes, sir.

A. Yes, sir.

Q. Mr. Houlihan was there?

A. Yes, sir.

Q. And you were there?

A. Yes, sir.

Q. I am going to direct your attention to Page 13, and I am going to ask you if you recollect the following questions and answers:

"Q. And you left the Flagship and where did you go?

A. I took a bus to Gerald Yagy's house."

Do you remember that question and answer?

A. Yes, sir.

Q. "Q. And where does Yagy live?"

A. I'm not following you, where are you?

Q. Excuse me, sir.

A. Yes, I see it now. "Where does Yagy live."

Q. "Q. And where does Yagy live?

A. Britton Road, right near the corner.

Q. Was Yagy at home when you went there?

A. Yes, he was."

Do you remember that question and answer?

A. Yes, sir.

Q. Is it not a fact that you did not meet the man who you identified as Mr. Yagy at the corner, that you actually met him at his house?

A. His house was the third house from the corner, I just considered that home on my testimony.

Q. So that there is a slight inaccuracy with respect to that little detail?

A. Very slight.

Q. Now --

THE WITNESS: Your Honor --

THE COURT: Wait a minute.

THE WITNESS: May I be excused?

THE COURT: Sure, step out.

(Thereupon the witness exited the courtroom at 11:34 A.M.)

THE COURT: I am very sure, ladies and gentlemen, that I will have to hold you somewhat beyond four today, perhaps until six or six thirty today. Also it becomes almost certain that we are going to have to work tomorrow. I regret that that is so.

(Thereupon witness entered the courtroom at 11:36 A.M.)

BY MR. KREMER:

Q. Now, again going back to your grand jury testimony, and directing your attention to Page 4, do you remember being asked the following question --

THE COURT: Tell him the line.

BY MR. KREMER:

Q. Line 8, beginning at Line 8.

A. I see it.

Q. Do you see the numbers on the line?

A. Yes, sir.

Q. Line 8:

"Q. You met with Yagy two or three days before the bank robbery or four or five days before the bank robbery, what, if anything, did he say to you at that time?

A. He asked me if I wanted to make some money, I told him yes. He told me that he had a job for me to rob a bank, and I refused him at first, and he told me I knew too much and I had better go along with him, and then I decided the best thing to do would be to go along with him because he is a furious man, and he explained to me what I had to do."

Do you remember that question and that answer?

A. Yes,sir.

Q. That was in the grand jury, correct?

A. Yes, sir.

Q. Now, as a matter of fact, that isn't the way it happened at all, was it? Yes or no?

A. He asked me if I wanted to --

Q. Yes or no, sir. That's not the way it happened, was it?

A. Did you say that's not the way it happened at all or the way -- what are you saying?

Q. I will withdraw the question.

A. All right.

Q. You did not tell the grand jury at that time that there was a possibility of making $75,000, did you?

A. No, sir.

Q. You did not tell the grand jury at that time that the reason you were participating in this robbery was because of the fact that you owed Mr. Yagy some four or five hundred dollars, did you?

A. No, sir.

Q. All right.

A. Mr. Houlihan didn't ask me that, so I didn't mention it.

Q. I see.

A. That is the only reason.

Q. I see. Now, turning your attention to Page 5, Line 5, do you remember being asked this question:

"Q. Where did you meet Lord?

A. In front of Gerry's store."

Do you remember that question and answer?

A. Yes, sir.

Q. "Q. Did you have a conversation with Lord at that time?

A. Yes, a small conversation. He told me what I had to do. He took me down to the bank with Yagy, and he ran through the route, which way I would be driving, I would have to sit in front of the bank and wait for them, drive out Crittenden Boulevard and make a quick turn into the hospital parking lot, and then we would switch cars."

Do you remember that question and answer?

A. Yes, I do.

Q. Now, at that particular time you did not tell the man who you identified as Lord that you were nervous, did you?

A. No, sir.

Q. You do not indicate there, as you testified on direct examination, 'You are going to get nervous, don't panic and leave without us.'

MR. HOULIHAN: Objection. If he is trying to impeach him on a prior statement, I think he has to show that the question was asked and that he answered it differently.

THE COURT: That is right.

MR. HOULIHAN: There was no question asked of him.

BY MR. KREMER:

Q. Did you on your direct examination indicate that you had a conversation with the man you identified as Mr. Lord in which he said to you, 'You are going to get nervous, don't panic and don't leave without us.'?

A. Yes, sir, that is true.

Q. That did not appear in the portion of the grand jury questions which I read to you?

A. Obviously not.

Q. Obviously, all right. Now, you testified that there came a time when you got to Mr. Yagy's house?

A. What page are we on?

Q. Page 13.

A. What line?

Q. Line 11.

"Q. Was Yagy at home when you went there?

A. Yes, he was.

Q. What, if anything, did you talk about when you got there?

A. He asked me if everything went down okay.

Q. Okay.

A. I told him yes. He asked me where the money was and where the other two men were. I told him that I left them at the Flagship. He asked me why. I told him I was scared, and he got angry. He told me that I should have never done that, left the money with them. So we sat in front of his house and we waited. About two hours later Lord and Schwartz pulled up and Lord dropped one of the guns off to Gerald Yagy, the handgun, Schwartz kept his shotgun."

Do you remember that question and answer?

A. Yes, sir.

Q. Do you remember testifying on direct examination that the man who you identified as Yagy, in response to your telling him that you had left the money at the Flagship, telling you, 'We may get fucked'?

A. Yes, sir.

Q. That doesn't appear in your grand jury testimony?

A. Yes, sir, you see from the time that I had that unfortunate incident, I am sure you know what I am talking about --

MR. KREMER: Your Honor --

THE COURT: Please. Go ahead without any reference to anything else other than what you were asked about.

MR. KREMER: Your Honor, I would like to make a motion.

THE COURT: No, your motion is denied, I know what the motion is. I will reserve on it.

BY MR. KREMER:

Q. I will ask the question again. The words, "We may get fucked" do not appear in the grand jury testimony, do they, sir?

A. No, sir. The reason for that -- I have had much time to think about what happened -- and it is possible that my memory is greater today than it was then because for the last two months I'm sitting in a hotel room with nothing to think about but this. Do you understand?

Q. Yes, sir. What you are saying is that your memory of recollection is better now than it was at that time when you testified in the grand jury on July 29, 1976? Possibly.

A. Isn't it true that you might say something sometimes and remember other things about the incident later, isn't that true, sir?

Q. We are trying to elicit the answers from you, Mr. Hook, and we will continue.

A. Okay.

Q. Now, do you remember on your direct examination saying to Mr. Yagy at his house, "I saw someone in front of the bank," and discussing that incident, do you remember telling us that?

A. Yes, sir.

Q. That doesn't appear in the grand jury testimony that I referred to, does it?

MR. HOULIHAN: Objection, your Honor. He read the whole question and the whole answer, and it is obvious that there was no further pursuit of the conversation. It is obvious they were there for a two hour period.

THE COURT: All right. He can answer the question, go ahead.

BY MR. KREMER:

Q. That doesn't appear there?

A. No, it doesn't.

Q. Then on direct examination you testified in reference to the man you identified as Mr. Lord, the man who you identified as Mr. Yagy said to you in obvious anger at Lord, the man you identified as Lord, "That fat slob has a bullet coming."

A. Yes, sir, he said that.

THE COURT: No, no, I was going to say that when you get into this type of thing just answer the question, and if you come to something you feel you need to explain, if Mr. Kremer wants an explanation he will ask for it.

THE WITNESS: Okay. No, sir, I didn't mention that in the grand jury testimony.

BY MR. KREMER:

Q. Now, you testified that there came a time when the specific details of the bank robbery were finally formulated, and that you were then going and proceeding to the bank to rob it?

A. On Friday you are talking about?

Q. Yes.

A. On Friday, yes, sir.

Q. And do you recollect saying on direct examination that with reference to your waiting for the alleged participants to emerge from the bank, didn't you say it did seem like an hour, in terms of the amount of time that you thought elapsed?

A. Yes, sir, I said that.

Q. Would you turn to Page 10 of your grand jury testimony?

A. I also testified that --

THE COURT: Wait for a question.

THE WITNESS: Page 10?

MR. KREMER: Yes, sir.

THE WITNESS: What line?

THE COURT: After Mr. Kremer and others have cross examined you, Mr. Houlihan will have an opportunity to ask you further questions. So wait for the question.

THE WITNESS: Okay, sir.

BY MR. KREMER:

Q. At Line 11:

"Q. Yes.

A. After we parked the blue car in the parking lot, I drove around into the plaza and pulled up in front of the bank. This is nine o'clock sharp.

Q. Okay.

A. And they both went in. It seemed like they were in there, I would say, from a half minute to a minute. They both come out, pillow cases and money."

Do you recall that question and answer?

A. Yes.

Q. Now, do you remember the judge asking you yesterday whether you knew if there was money in the pillow cases, and you answered in substance, 'Yes, I knew there was money because I could see through the pillow cases.' Do you remember that question and answer?

A. Yes, sir.

Q. Is that still your testimony today, that you could see through the pillow cases?

A. Well, if the money is pressed against the pillow case, you can see the impression of the money. I mean anybody with 20-20 can -- those pillow cases weren't -- you didn't have to be Superman to see through the pillow cases.

Q. You knew then they had money in those pillow cases, did you not?

A. Yes, sir, why else would you go rob a bank but to pick up money?

Q. Then they opened the door and off you went, correct?

A. The doors were left partially open when they got out of the car so they could make the getaway quick. They were not jammed shut, Lord got in the back, Schwartz in the front.

Q. And you drove away?

A. Yes.

Q. You remember all of those details today?

A. Yes, sir.

Q. And you testified that you were nervous about this, weren't you?

A. Yes, sir, I was very nervous.

Q. Yet your nervousness didn't interfere with your ability to remember these details, did it?

A. Obviously not, no, sir.

Q. Now, there came a time when you testified yesterday that before the bank robbery occurred that you told the man who you identified as Lord that this is the first job that you ever done?

A. Yes, sir.

Q. Do you recollect that testimony on direct examination?

A. Yes, sir.

Q. All right. And you are sure that is the first job that you've ever done?

A. Oh, yes, sir.

Q. All right. Now, you are not being charged with this bank robbery, are you?

A. No, sir.

Q. No.

A. I have no guarantee of that.

Q. You have no guarantee of that?

A. No. In other words, I have no written immunity. Okay?

THE COURT: You haven't been charged at this point?

THE WITNESS: No, sir.

BY MR. KREMER:

Q. If I told you that Mr. Houlihan, your lawyer, had already --

THE COURT: He is not his lawyer.

THE WITNESS: He is not my lawyer.

MR. KREMER: I will withdraw the question. My apologies to your Honor and to my adversary.

BY MR. KREMER:

Q. Hasn't the Government attorney told you that you would not be prosecuted for this?

A. He didn't tell me that until just before my grand jury testimony. In other words, when I gave the information to the authorities in the hospital I had no guarantee whatsoever.

THE COURT: The simple answer is yes, he told you that.

MR. KREMER: I renew the motion, your Honor.

THE COURT: No. I will take that as a continuing motion.

MR. KREMER: Fine. Thank you, your Honor. That will obviate the necessity of further motions of that sort.

THE COURT: Yes.

BY MR. KREMER:

Q. Mr. Hook, you do have immunity from prosecution, don't you?

A. I have no written immunity from prosecution.

Q. But you just told me, didn't you, sir, that the Government prosecutor told you that you wouldn't be prosecuted?

A. He told me, sir, that's as far as it went.

Q. All right. You are not expecting to be prosecuted, are you?

A. No, sir.

Q. No. So that you are going to walk out of this courtroom at the conclusion of your testimony and there will be no further inquiry affecting your life with respect to this bank robbery, will there?

A. Not with the Government, sir.

Q. All right. Now, you testified that your share of this bank robbery was $9,700?

A. Yes, sir, approximately.

Q. You also testified that the man who you identified as Yagy, that his share was counted out in one dollar bills, correct?

A. One dollar bills, small, in fives, no big bills. I remember Lord saying to me in the hotel, "We are going to give Gerry all the singles." He got some singles, he probably got some fives, too.

THE COURT: Just answer the question.

MR. KREMER:

Q. So that your testimony then with respect to the statement that Mr. Yagy was to get all of the singles is partially correct then?

A. It is correct.

Q. You just testified that he was also going to get fives and tens, too?

A. Your client told me this. I'm not saying he received all singles. That is what your client, Jimmy Lord, told me.

Q. I see. That is the man who you identified as O'Brien?

A. Right.

Q. Okay. Now, you testified that on the day of the bank robbery there came a time after the bank robbery that you subsequently had a luncheon engagement with a man who you identified as Mr. Yagy, correct?

A. No, sir, I seen him in the restaurant, I didn't have lunch with him.

Q. You saw him in the restaurant?

A. Yes, sir.

Q. And you told us on your direct examination that you saw that he was, as you thought, eating fish on that particular day?

A. Yes, sir. He had his kids with him.

Q. He had his kids with him. Your recollection today is that he was eating fish?

A. Yes, sir. It was a Friday.

Q. Now, you told us in your direct examination that after the bank robbery was completed and after the participants were in the car, you used the term "fled." It is my recollection that you said, 'We fled the vicinity,' is that your recollection to what you said?

A. Yes, sir.

Q. I turn your attention to Page 11 of the grand jury testimony --

THE COURT: What line?

BY MR. KREMER:

Q. I'm sorry, forgive me. Line 15:

"Q. And what did you do after that?

A. I drove out of the plaza onto Cirttenden Boulevard, made a quick turn in the hospital parking lot where we got out of the black car and got into the blue car, where Lord was driving, Schwartz was sitting in the front seat, I was laying down in the back seat."

Do you recollect that question and that answer?

A. Yes, sir.

Q. And, of course, in the grand jury testimony you didn't say, 'We fled the vicinity,' did you?

A. I said we left the vicinity. I said here -- wait a minute --

Q. Line 16, sir.

A. All right. Line 22, "We drove around and they pulled over on the side street," that means we left the vicinity.

Q. Excuse me, please. I asked you if the term "We fled the vicinity" appeared in your grand jury testimony?

A. No, it didn't.

Q. All right. Now, this term "We fled the vicinity," that isn't the way you normally speak, is it?

A. Yes, I am using my --

Q. You are sure that is not a term that you used when you were discussing your testimony?

A. Yes, sir, I'm positive, sir.

Q. You're positive what, sir?

A. Nobody encouraged me to use that word.

Q. I didn't say encouraged you to use it. This is something you heard someone else using to describe the situation?

A. No, sir, not that I remember.

Q. The term "flee" or "fled the vicinity" is a term that you would use in your normal pattern of speech?

A. Yes, sir.

Q. Okay. Now, it was your testimony in substance that you were getting ready to do the bank robbery, this was after you had been introduced to the man who you identified as Mr. Lord and Mr. Schwartz, you indicated that you were nervous or afraid of doing the job, correct?

A. Yes, sir, that is correct.

Q. Now, at that time you didn't go to the police and say to them, 'I'm about to pull a bank robbery, these are the details, protect me,' you didn't do any of that, did you?

A. No, I was more afraid of Yagy and what he would do to me if I go to the police.

Q. Weren't you more afraid you wouldn't get your $75,000?

A. No, sir.

Q. Wasn't the $75,000 the prime factor to you in involving yourself in this bank robbery?

A. I don't know how to explain it.

Q. Yes or no?

A. Prime factor?

Q. Yes, sir.

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A. No, sir. The prime factor was --

Q. The prime factor was to pull you out of debt?

A. Right.

Q. Your debt was only $400?

A. Yes, sir.

Q. Your debt was only $400, you were going to then make $74,600 all for yourself, weren't you?

A. If I would have gotten the $75,000 that's what I would have profited, yes, sir.

Q. You were going to pay the $400, weren't you, pay him the $400?

A. Yes.

Q. And then after you paid the $400, you subtract $400 from the $75,000, you have how much?

A. I didn't expect to subtract only $400, sir. I expected to subtract a little more, I didn't know how much. Yagy said he wanted a cut of my share.

Q. You expected to deduct a little more, how much more?

A. I didn't expect it to be as much as $4,000.

Q. How much more did you expect?

A. About a thousand.

Q. What would that thousand be deducted for, what account was this to repay?

A. For introducing me and getting me set up in this job, making it possible for me to make this money.

Q. Sort of a finder's fee?

A. Right.

Q. So that you anticipated that there would be $400 taken out to repay the man who you identified as Yagy, and $1,000 taken out as a finder's fee or whatever, that would total how much, those two amounts?

A. $1,400.

Q. And you were not expecting anymore deductions, were you?

A. No, sir.

Q. And $1,400 from $75,000 is how much?

A. How much?

Q. Yes.

A. Seventy three six hundred.

Q. Seventy three six hundred. And you were going to have $73,600 all for yourself, weren't you?

A. I didn't rely on that. Mr. Yagy said that it's possible, $75,000, that's what I testified to. He said, "It's possible it's going to be around there." I did expect taking a good sum of money.

Q. You were hoping for $73,600, weren't you?

A. I was hoping for a million, sir.

Q. If you had gotten a million, you would have taken a million, wouldn't you?

A. Yes, sir.

Q. You didn't get the million?

A. No, sir.

Q. Isn't it a fact that your prime motive for getting into this was to get $73,600 or as close to it as you could get?

A. No, sir, it was to get out of debt.

Q. It was to get out of debt?

A. Yes, sir.

Q. Now, if you had gotten the $73,600, you weren't about to turn it over to charity, were you?

A. No, sir.

Q. You were going to keep it for yourself, weren't you?

A. Well, no, sir, I would have liked to have helped my family out, if I could have without showing them too much money. Sharing it with them, if possible, without them noticing I had a large sum of money. That would have made me happy.

Q. How much did you have allocated for that purpose?

A. I didn't compute any figures, sir.

Q. Just some act of disinterested kindness to help the family that had helped you?

A. Yes.

Q. It wasn't to repay any of the money that you borrowed from your mother or sister though, was it?

THE COURT: Let me suggest that we are belaboring this a bit.

MR. KREMER: Thank you, your Honor. I will accede to the Court's direction. If the Court will grant me one moment?

THE COURT: Yes.

BY MR. KREMER:

Q. Every single thing that you have told us this morning is the truth, correct?

A. Absolutely correct, sir.

Q. Fine.

A. As near as I can remember.

Q. As near as you can remember?

A. Yes, sir, the whole truth, nothing but the truth.

Q. Your memory is pretty good today?

A. Pretty good.

MR. KREMER: Thank you, sir.

THE COURT: We will take a recess at this time, ladies and gentlemen, and come back at about ten after one, and remember my general admonition, do not talk about the matter yet, do not read the newspapers or watch television or talk with anybody else. I will see you back here.

(Thereupon the jury exited the courtroom at 12:05 P.M.)

THE COURT: I made mention to Mr. Kremer, as twice he brought up again his motion, obviously a motion for a mistrial, I construed that properly, did I not?

MR. KREMER: Yes, thank you, your Honor.

THE COURT: And sort of arranged that this would -- I would reserve -- this would be sort of continuing. I know Mr. Colicchio has a motion for a mistrial pending.

MR. COLICCHIO: Yes, I didn't want to interrupt.

THE COURT: I know. Again, Mr. Morehouse, I don't think you have made any motion for a mistrial. At one point you said something about joining in.

MR. MOREHOUSE: I didn't want to cause a commotion.

THE COURT: Have you in the past made a motion for a mistrial that I haven't ruled on?

MR. MOREHOUSE: Yes, please.

THE COURT: As to all of those, in the continued examination we will keep that under reservation, so we don't have to keep the pot boiling every time something new comes up on it.

MR. KREMER: Thank you, your Honor.

(Thereupon the court was in recess at 12:10 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 1:25 P.M.

(Defendants present, counsel present, jury absent.)

THE COURT: It should be stated on the record, gentlemen, that in addition to the Sheriff's material and other materials that I examined, I have the grand jury testimony from the Monroe County Grand Jury where Mr. Hook was a witness, but nothing in either of those two has any relevancy to this case.

MR. KREMER: Thank you, your Honor.

(Thereupon the jury entered the courtroom at 1:27 P.M.)

THE COURT: Mr. Morehouse?

CROSS EXAMINATION BY MR. MOREHOUSE:

Q. Mr. Hook, I would like to take you back to early April of 1976, to the time when you had a conversation with some gentleman out in front of the store, when you said Mr. Yagy invited you to participate in the job, do you remember that event?

A. You are talking about two different events. I met with Yagy by himself once, and I met with him and Lord another time.

Q. I am referring to the time when you conversed with Mr. Yagy about participating in the enterprise?

A. Yes.

Q. You testified, I believe, yesterday -- stop me if I am wrong, if your memory isn't as good as mine -- I believe you testified yesterday, probably toward mid-afternoon, that you conversed with Mr. Yagy for a period of fifteen, twenty minutes at that time, and you told the jury in substance that Mr. Yagy invited you to participate in the job, and I think you said that he said, 'There is nothing to worry about, it's all going to be fine.' You first were reluctant, it can't be done?

A. That was my first expression.

Q. Did that conversation take fifteen or twenty minutes?

A. Approximately a half hour.

Q. You talked a half an hour?

A. I would say so, yes. Around there, I'm not sure, I didn't have a watch at the time.

Q. Your best guess?

A. About that. Twenty minutes to a half an hour or so.

Q. And is that the complete conversation which you have told the jury that took place in the half hour conversation?

A. Yes, I believe so.

Q. You testified this morning, I think, about making loans from your boss when you were working at the station?

A. Yes, I did.

Q. Do you remember?

A. Yes, sir.

Q. I think you said he lost the station but you didn't know the reason why?

A. That is right, sir.

Q. When you borrowed these sums of money from him immediately before he lost the station, did he ever take the position that he didn't have the cash, that he was short, or that he was unable to lend you some money, do you remember?

A. Usually when I asked the boss for money, he would give it to me, let me borrow. He knew it was a -- that he would be paid back.

Q. He continued to make loans up to the time he lost the station?

A. Well, no, sir. Toward the end -- I don't remember asking him for money just before he lost the station.

Q. Toward the end you had no need for loans?

A. No, I didn't say that. I don't remember asking him for money at that time.

Q. I see.

THE COURT: Do you want to mark it as an exhibit? I think it is good to mark it. Shall we mark it Defendant's Exhibit 7?

MR. KREMER: Yes, your Honor.

MR. MOREHOUSE: I just wanted Mr. Hook to have one. I am going to ask him a couple of questions.

THE COURT: I think it is good to mark it as an exhibit.

(Thereupon document referred to was marked Defendant's Exhibit 7 for identification.)

BY MR. MOREHOUSE:

Q. Mr. Hook, I think you testified about April 9th, as you said, the other two gentlemen accompanied you in an automobile, I think you said you proceeded to the Tiptop Restaurant?

A. I went to the Tiptop Restaurant with Mr. Yagy and only Mr. Yagy.

Q. I'm sorry, I didn't hear you.

THE COURT: Read it back.

(Thereupon the last answer was read by reporter.)

BY MR. MOREHOUSE:

Q. Didn't you say you proceeded to the Tiptop Restaurant?

My memory might be wrong.

A. You mean I used the word "proceeded"?

Q. I think you used the word "proceeded" here in court.

A. I don't remember. I don't remember what I said, sir, I'm sorry.

Q. Ordinarily you would say, 'We went to the Tiptop, or we went to wherever.'?

A. I would use either term, just depending on how I felt like speaking.

Q. I see. Mr. Hook, is it a fact that three or four days prior to April 9th you conferred with two men and agreed to participate in this transaction, is that the fact?

A. Yes, three days before.

Q. Three days before?

A. Yes.

Q. Is it further a fact that you had three days within which to change your mind and get out of the transaction?

A. Yes, the thought had entered my mind.

MR. MOREHOUSE: No further cross.

THE COURT: Mr. Colicchio?

CROSS EXAMINATION BY MR. COLICCHIO:

Q. Good afternoon, Mr. Hook.

A. Good afternoon, sir.

Q. Mr. Hook, before coming to court to testify this week, did you review notes made by yourself regarding the bank incident of April 9, 1976?

A. No, sir.

Q. Did you review any statements that were given by yourself to any agents of the FBI?

A. Yes, sir.

Q. And were these statements in your handwriting?

A. They were typed, sir.

Q. Were these reports given to you by Agent VanZant?

A. Yes, sir.

Q. And were these typed reports of Agent VanZant, do you know?

A. Pardon?

Q. Were they typed reports of Agent VanZant's?

A. About him?

Q. No, made by him.

A. I believe so, yes, sir.

Q. Do you recall seeing Mr. VanZant's name typed at the bottom of the page or the form?

A. Yes, sir.

Q. All right. And were you given a transcript of your testimony before the federal grand jury, such as you have before you, Exhibit 7?

A. Yes, sir.

Q. And did you review those documents before coming to court to testify this week?

A. Yes, sir, once.

Q. All right. Now, were you asked to -- after the bank robbery of April 9, 1976 to the present time -- were you asked to give your own statement in your own handwriting regarding the bank incident?

A. No, sir.

Q. Now, sir, isn't it a fact that you have known Gerry Yagy for more than three years? I don't mean intimately or on a family basis, but you were aware of who Gerald Yagy was?

A. That's right, sir.

Q. And it is my understanding, sir, that you have attended more than just John Marshall High School, is that correct, as far as high schools are concerned?

A. Yes, I attended Greece Arcadia.

Q. You went to Charlotte High School?

A. Yes, sir.

Q. And there came a point after you were suspended from John Marshall High School that you removed yourself from John Marshall High School to go to East High School evening hours, is that correct?

A. No, sir, I went to a school on Clinton Avenue.

Q. Weren't you supposed to go to East?

A. No, I was advised to go to the school on Clinton Avenue by my guidance counsellor.

Q. Wasn't there a suggestion that you go to East High School?

A. Yes, sir, that was mentioned as one of the alternatives.

Q. Did you attend class at East High School, evening session, for about ten days?

A. No, sir, never been there in my life.

Q. To night school?

A. I never went to night school.

Q. You never went there either?

A. I went to the afternoon class.

Q. And do you know the name of that school?

A. It's called the Threshold School on Clinton Avenue.

Q. Did you ever go there?

A. Yes, sir.

Q. How long?

A. I went there approximately three weeks and I had to -- I was forced to give up the class.

Q. What do you mean forced to give it up?

A. Are you sure you want me to go into it?

Q. No. When did you go to that class, during that year?

A. 1976.

Q. Now, your last attendance at Marshall is when, sir?

A. During September of 1975, I believe, sir.

Q. All right. Is it a fair statement that you removed yourself from John Marshall High School around the end of September 1975?

A. Yes, sir.

Q. Sir, while you were working at Columbo's gas station you were in charge, I believe, as you said, of the cash register during your shift?

A. Several times, sir.

Q. A number of occasions, is that correct?

A. Yes, sir.

Q. And to refresh your recollection, Columbo's gas station closed around April 7, 1976.

A. I don't remember when it closed, sir. I don't think you are correct, I think it was before that.

Q. Was it April 1976?

A. Possibly could have been March; I'm not sure, sir, that's vague.

Q. Did you work right up to closing time?

THE COURT: When he closed the business?

THE WITNESS: Yes, sir, sometimes I --

BY MR. COLICCHIO:

Q. I'm not asking you about closing time of the operation of the business, did you work at Columbo's until they closed its business doors?

A. Yes, sir.

Q. If Columbo's closed the business the first of April 1976, you worked there until about April 1, 1976, is that correct?

A. Yes, sir. I even worked there the last three days, I believe it was.

Q. Are you saying you did work?

A. I was employed by Columbo up until the time he went out of business.

Q. Whatever that date was, that is the last day you worked at Columbo's?

A. Yes, sir.

Q. Were you on a — were there fellows working at Columbo's on a weekly salary basis, as compared to an hourly rate?

A. Yes, sir.

Q. As far as yourself is concerned, does that refresh your recollection as to whether you were on a salary basis or an hourly basis at the time Columbo's closed?

A. It was an hourly basis.

Q. How much were you being paid at that time?

A. At the end?

Q. At the end.

A. $3.00 an hour.

Q. And were you working forty hours a week at that time?

A. I was working whenever he needed me. There was no way of telling.

Q. Sir, did you work — let's take —

A. I worked — I was working full time, five days a week, some days I would work over eight hours.

Q. When you ended up at the end of the week was it forty hours a week?

A. No, it wasn't.

Q. Thirty?

A. More.

Q. Between thirty and forty?

A. Yes, I would say.

Q. Was it more than forty?

A. Sometimes more than forty.

Q. Taking the last month, the last month that Columbo's was open, how many hours a week did you average each week for the last four weeks?

A. I would say about forty hours. Actually, I'm not sure.

Q. All right. Now, would it be fair to say somewhere between thirty five and forty hours?

A. Yes.

Q. All right. Now, you were paid by your employer $3.00 an hour?

A. Yes, sir.

Q. So you had somewhere between one hundred to one hundred twenty dollars a week gross pay?

A. I haven't figured it, I assume you are correct though.

Q. During this period of time, sir, you went to Macaluso's Pizzeria located across the road from the gas station?

A. Yes.

Q. You had been going there for at least three years before the gas station closed?

A. Not -- maybe once a week.

Q. Did there come a time that you started to go two or three times a week?

A. When I started to work for him.

Q. I'm not talking about that. I am talking about before Columbo's closed?

A. Yes.

Q. And the pizzeria was to a certain extent a gathering point for the kids in the neighborhood from time to time?

A. For the younger kids, yes, twelve, thirteen, used to play the pinball machines.

Q. You used to play the pinball machines yourself?

A. Sometimes, not often. I wouldn't, you know, spend my Saturday nights there.

Q. I didn't ask you that, sir. I don't know where you spent your Saturday nights. Did you come there and play the pinball machines?

A. Yes.

Q. You came in often during the week to play the pinball machines?

A. Yes, sir.

Q. And before you left your employment at Columbo's I understand you indulged in gambling, is that correct?

A. Yes, sir. I did.

Q. You enjoyed it, didn't you?

A. No, it was frustrating.

Q. You did it?

A. I did it.

Q. No one forced you to do it? I'm talking about before you left Columbo's?

A. Before I left?

Q. Yes.

A. Let's say in December of '75.

Q. December '75. Did anybody force you to gamble in January of '76?

A. No, sir.

Q. Did anybody even force you to gamble at anytime?

A. Actually twist -- you mean twist my arm? No, sir.

Q. In fact, you thought gambling, whatever time you did it, was a thrill, didn't you, at least initially?

A. It wasn't thrilling, it was like I said, discouraging.

Q. You lost a lot?

A. Yes.

Q. Did you ever tell your father that you lost a lot?

A. No, sir.

Q. Did you ever tell your mother that you lost a lot?

A. No, sir.

Q. Were they aware that you were gambling, wherever it might be?

A. They were aware, but they thought it was small stakes and, you know, they didn't know I was engaged in big card games.

Q. Now, I understand you didn't have breakfast or lunch at home, and on occasion you had dinner at home, is that correct?

A. Yes.

Q. Did your parents ever ask you how come you are not home nights having dinner?

A. Many times.

Q. Isn't it a fact that you had a disagreement with your mother and father regarding your activities?

A. Yes, sir, they didn't like me staying out all hours of the night.

Q. Isn't it a fact you had arguments with your parents as to why you weren't working?

A. No, sir, because I was always looking for a job, always.

Q. Isn't it a fact that from time to time you were asked to leave the house?

A. No, sir.

Q. Isn't it a fact that your mother removed you from the house one time?

A. No, sir.

Q. Isn't it a fact that you packed your suitcase and came to Mr. Yagy's house and asked for some shelter?

A. No, sir.

Q. You never went down to his house?

A. No. I went to his house with my suitcase, I didn't ask him for shelter.

Q. You asked him to stay there?

A. No, sir. I didn't have my suitcase with me when I was there. I left the suitcase at the pizzeria so I wouldn't have to lug it around.

Q. This was before April 9, 1976?

A. After, sir.

Q. Did you have a discussion with your mother about leaving the house?

A. I told her I was going to leave for a few days, I had an argument with my little brother, she got upset.

Q. This school, when did you start this Threshold School on Clinton Avenue?

A. Approximately, I would say, the beginning of October.

Q. 1976?

A. Yes, sir.

Q. Is it my understanding you were out of school from around the end of September 1975 until somewhere in October of 1976?

A. Yes, sir.

Q. In other words, at least a year?

A. Yes, sir.

Q. Now, this Threshold School that you were referring to, sir, did you attend classes where they teach English, math?

A. Different subjects every day, sir.

Q. Are you tutored individually or is it a group study?

A. It is a small group study.

Q. Ten, twelve children?

A. More like six or seven.

Q. Did you have the services there of social workers?

A. Yes, but not in my department, I was there solely to go to school. It was also a center for drug addicts, a medical clinic. My purpose in going there was for school and education only.

Q. The Threshold School is more of a counselling agency for children with problems of various natures?

A. Some of it is, some for schooling. I was there for schooling.

Q. Now, isn't it a fact that your boss at Columbo's service station didn't know that you were borrowing money from the cash register for various personal use?

A. He knew it, sir, but I told him after I had taken the money.

Q. Who is the boss?

A. Russ Columbo.

Q. How often did you tell him that you tapped the till for your own use after you did it?

A. Just about every time, sir.

Q. You are saying that -- how many times --

A. I didn't do it that much.

THE COURT: Wait for the question.

BY MR. COLICCHIO:

Q. How many times is every time?

A. I would say six or seven times at the most.

Q. You are telling me that Mr. Columbo knew on six or seven occasions that one of his employees had been putting his fingers in the till for his own personal use, yet retained you?

A. No, sir, he didn't know the six or seven times. He knew it most of the time, maybe four or five times.

Q. Well, then let me ask you this. You did it six times and the boss knew it four or five times, you are saying that even after he learned you were doing it that he retained you as an employee?

A. Kept me on, yes, sir.

Q. Now, after Columbo's closed, how soon after that did you start to do some kind of work in the pizzeria?

A. Immediately.

Q. Immediately?

A. Yes, sir.

Q. Now, did you go to Mr. Yagy and say, 'I need some kind of work'?

A. No, sir, he came to me.

Q. And did you have some particular qualifications that would make you a perferable employee at the pizzeria?

A. I don't think you needed qualifications to work there.

Q. What were you doing?

A. Delivering pizzas.

Q. And is it not a fact that the pizzeria, Macaluso's, had any number of people delivering pizzas from time to time?

A. Yes, sir.

Q. There wasn't one steady driver?

A. Never, sir.

Q. When you say you worked in Macaluso's Pizzeria, was it on a forty hour a week basis?

A. No, sir.

Q. Was it on a casual basis? I mean that by one night you may work, you may not work for two or three nights again.

A. Yes. Sometimes I would work seven days a week.

Q. How often would you work seven days straight at the pizzeria?

A. Not often.

Q. Would it not be a correct statement, sir, to say that in general you worked at best two or three nights delivering pizzas at a time or within a week?

A. No, sir. When he had me deliver, he would keep me on for a week, a week and a half, and maybe he would find somebody else. I would say, "Please find somebody else," then he would come to me later maybe and say, "I'm stuck, I need a driver, would you help me?"

Q. Would it be a fair statement that Macaluso's Pizzeria hired on a casual basis drivers when they were needed?

A. Yes, sir.

Q. And while you were working on a casual basis with Macaluso's Pizzeria, where else did you work, if anywhere?

A. I didn't work at all.

Q. Did you go to the New York State Labor Board and ask to be put on the job wanted list?

A. No, sir.

Q. Did you go to any employment agency asking if they have any work for you?

A. Yes, I went to the Youth Opportunity, looked over what they had, kept making frequent visits to Lawyers Cooperative Publishing Company, looking for a job there.

Q. Lawyers Coop, did they have any openings?

A. No, sir, because I was seventeen years old at the time.

Q. And the Youth Opportunity that you looked at, did they have job opportunities?

A. Not in my area. I needed transportation, my father's car wasn't available to me all the time.

Q. And what was your -- at that time what was your immediate area? Did you ever think of taking a bus to go to work?

A. Certain places you can't take a bus.

Q. Was there bus transportation available? I appreciate that --

A. Yes, this was available to me to get downtown, the Lake Avenue bus is the closest line by my house.

Q. Did you ever exercise the judgment to take a bus to go to work?

A. Yes, I thought about it.

Q. It didn't appeal to you?

A. Taking a bus doesn't appeal to me, no.

Q. Now, isn't it a fact that you went to one or more gambling establishments without Mr. Yagy before April 9th?

A. Yes, sir.

Q. Is that correct?

A. I'm not sure if I first went there by myself before April 9th or after April 9th. It's possible, but I'm not going to say for sure.

Q. I am interested in the fact that you have gone to these establishments without Mr. Yagy.

A. By myself, yes.

Q. Isn't it also a fact that --

A. At first I didn't.

THE COURT: Wait for the question.

BY MR. COLICCHIO:

Q. Isn't it a fact that whenever you went with Mr. Yagy, you asked him to allow you to accompany him?

A. No, sir.

Q. Did Mr. Yagy put a collar on your neck and say, 'Come with me'?

A. No, sir.

Q. Did you meet him there?

A. No, sir. He would --

Q. I haven't asked you yet.

A. Okay.

Q. Let me ask you this, did you ever gamble with any of the other gentlemen at that table, Mr. Lord, Mr. Schwartz?

A. Yes, sir, I gambled with Mr. Schwartz before.

Q. After April 9th?

A. Yes, sir.

Q. And were there other people in your neighborhood that you went in gambling establishments with?

A. Yes, sir.

Q. Now, weren't there times that Mr. Yagy told you not to go to gambling establishments, they were not good for you?

A. No, he told me not to go to gambling establishments but that was after the bank robbery. He said he don't want me showing any money there.

Q. At any time before April 9th did he tell you it would be better for you to go yourself?

A. No, sir.

Q. At any time, do you know, did Mr. Yagy tell people at these establishments, where you said you went, not to let you in?

A. No, sir, not that I know of. As a matter of fact, he used to tell --

Q. Answer the question. Did he ever tell people that you know of not to let you in?

A. I answered it.

Q. The answer is not that you of?

A. That's right.

THE COURT: Not as far as you know?

THE WITNESS: That's right.

BY MR. COLICCHIO:

Q. Shortly after you left your employment at Columbo's, did you tell Mr. Yagy you wish you had some work, you are always broke?

A. Yes.

Q. And isn't it a fact, sir, that at one time Mr. Yagy said to you, 'If you want work, there is a gentleman here who needs a driver,' without mentioning anything about bank jobs, he said, 'Here's a fellow who needs a driver, talk to him.'?

A. I don't remember, sir.

Q. Isn't it a fact, sir, that when you were introduced to Lord, as you say you were, that Mr. Yagy said to you, 'If you are looking for work, here's a man looking for a driver.'?

A. No, sir.

Q. Isn't it a fact that Mr. Yagy said nothing to you about a bank job?

A. No, sir.

Q. I'm talking about the time when you say you were introduced to Lord.

A. Wednesday night are you talking about?

Q. Would that be the night? The bank robbery you say happened Friday?

A. Yes. He did talk about a bank robbery.

Q. Mr. Yagy did?

A. Yes.

Q. To you?

A. Yes, sir.

Q. Why should he talk in front of you about some situation that could well implicate Mr. Yagy is a serious matter, why should he talk about it in front of you?

A. Because he was implicated.

Q. I said why should he talk about it in front of you?

A. Because he wanted me to drive the car.

Q. Did he ask you if you wanted to drive a car?

A. Yes, sir.

Q. And you said it can't be done?

A. Right, yes.

Q. When you said it can't be done, you were not saying you didn't want to, you didn't think it was physically possible to do it?

A. I was saying both, sir.

Q. As I understand your testimony, you didn't say directly, 'I don't want to do it,' you said, 'It couldn't be done.'?

A. Yes, sir.

Q. Is it my understanding that for a $400 debt you ventured into an area you knew nothing about, that being a bank robbery?

A. Yes, sir.

Q. Yet, if I understand your testimony, you could have asked your parents for financial assistance?

A. Yes, sir, but my parents aren't very well off.

Q. You could always look for a job, is that correct?

A. I did, I couldn't find one.

Q. Let's put it this way, you were not interested in taking a bus to work, is that correct?

A. If I had to, I would have.

Q. Didn't you find yourself, sir, without employment of any -- without any steady employment, isn't that a necessity, to find work?

A. Yes.

Q. I mean the fact you don't have work, a paycheck coming in, regardless of your age, isn't that a necessity, to find work?

A. Yes, sir, you must have work.

Q. Wasn't there a need at that time to find work?

A. Yes, sir.

Q. Yet in the exercise of your judgment, you were not too happy about taking a bus to go to work?

A. If you say so. I said I was not, I don't enjoy bus riding, that's all I said.

Q. That is part of the exercise of your judgment, not to take a potential job?

A. No, sir.

Q. Did you consider it as one of the needs to obtain work that you have to take a bus?

A. I never even considered a bus. I forgot they were there, it never entered my mind.

Q. Isn't it a fact, sir, that whatever conversations you had with Mr. Lord were strictly between you and Mr. Lord, and Mr. Yagy wasn't there, isn't that a fact, when you met Mr. Lord?

A. When I met him?

Q. Yes.

A. Mr. Yagy was present and he was involved in our conversation.

Q. You were saying that Mr. Yagy participated in the conversation?

A. Yes.

Q. At any time did Mr. Yagy leave the conversation the evening you met Mr. Lord?

A. No, sir, not that I can remember.

Q. Was Mr. Yagy present listening to the conversation only?

A. No, he was listening and he was talking.

Q. And the day that -- excuse me -- there came a time you say that you drove with Mr. Lord to view the bank and the route that was going to be involved, is that correct?

A. I drove with Lord and Mr. Yagy.

Q. I understand you say that. Mr. Yagy, did he drive the car or was he riding as a passenger?

A. He was riding the front seat, passenger side.

Q. Where were you?

A. In the back seat.

Q. Did Mr. Lord allow you to drive the vehicle during this so-called dry run, if you want to use another word?

A. No, sir, he didn't allow me. He didn't -- he felt it wasn't necessary. He said it wasn't the car we would be using in the bank robbery.

Q. You observed all this, is that correct?

A. Yes, sir. I also observed --

Q. You observed this what I am asking you about?

A. Yes.

Q. At that time, just before April 9, 1976, it is my understanding that you did not go to any police authority and report a potential bank robbery?

A. No, sir, I didn't.

Q. Now, when you reviewed Agent VanZant's typewritten report before coming to testify -- strike that. I will show you a document, sir, which has your name, your address, at the bottom it says, "Interviewed 7/17/76, by Special Agent

Clinton VanZant." That is Agent VanZant?

A. Yes, sir.

Q. Now, I ask you, sir, will you look at the first sheet of this document, and I ask you if that is one of the documents you reviewed?

A. Yes, sir.

Q. Now, the first paragraph identifies yourself, is that correct?

A. Yes, sir.

Q. The second paragraph starts off with "Hook indicated that --" and it starts going into April 1976, is that correct?

A. Yes, sir.

Q. And it indicates about a bank robbery, is that correct?

A. Yes, sir.

Q. Anywhere on that front page does it say that --

MR. HOULIHAN: I object unless Lord's statement --

THE COURT: Lord's statement?

MR. HOULIHAN: Excuse me, Hook's statement, it is what Mr. VanZant reported.

THE COURT: All right, that may be true, it is open to argument, of course, and the only question is anywhere on the first page is there some particular item.

BY MR. COLICCHIO:

Q. Is there anything on the first page, any report that you stated to Mr. VanZant that you gambled with Mr. Yagy?

A. Just a moment.

Q. You can read it through.

A. (Witness examines document.)

Q. Is there anything on that first page about it?

A. About what?

THE COURT: Read the last question back, please.

(Thereupon the reporter read as follows:
"Q. Is there anything on the first page, any report that you stated to Mr. VanZant that you gambled with Mr. Yagy?)

THE WITNESS: No, sir.

BY MR. COLICCHIO:

Q. Is there anything on that first page stating that you had a gambling debt of — that you had a gambling debt period?

A. No, sir.

Q. Is there anything on that first page of this report stating that Mr. Yagy introduced you to Mr. Lord or, as you say, you knew him to be Mr. O'Brien?

A. No, sir.

THE COURT: Why are the questions limited to the first page, as far as this particular type of questioning is concerned?

MR. COLICCHIO: Because, your Honor, the next -- well, I can say all three pages, but it gets [illegible] other areas.

THE COURT: You are asking him whether there is some particular item reflected on the first page. Now, if in fact that item shows up on the second page --

MR. COLICCHIO: No.

THE COURT: You are testifying.

MR. COLICCHIO: Okay.

BY MR. COLICCHIO:

Q. I ask you to look at the second and third page, and I ask you, as to those specific questions, whether the first, second or third page contains any reference of your report that you gambled with Mr. Yagy?

THE COURT: Before the bank robbery?

MR. COLICCHIO: Yes, your Honor, before April 9, 1976.

THE WITNESS: No, sir.

BY MR. COLICCHIO:

Q. Is there anything on those three pages that states that you had a gambling debt of any kind?

A. No.

Q. Is there anything on those pages that state Mr. Yagy introduced you to a gentleman that you refer to as Mr. Lord or Mr. O'Brien?

A. No, sir.

Q. Is there anything on these three pages that states that Mr. Yagy drove you to the Tiptop Restaurant?

THE COURT: Let me see that document, will you?

MR. COLICCHIO: Yes, your Honor.

THE COURT: Here you are, Mr. Colicchio.

MR. COLICCHIO: Thank you, your Honor.

THE WITNESS: Your Honor, may I be excused for a minute?

THE COURT: All right.

(Thereupon the witness exited the courtroom at 2:12 P.M., and returned at 2:13 P.M.)

BY MR. COLICCHIO:

Q. Now, Mr. Hook, again I show you the same report that you reviewed before testifying here today. Does it not state in the second paragraph, "Hook indicated immediately after the bank robbery they drove O'Brien's blue Chevrolet Nova to the Flagship Restaurant in Rochester where they entered the room and counted the money, and all received their share of the proceeds of the robbery." Does that report say that?

A. Yes, sir.

MR. COLICCHIO: One moment, your Honor, please?

THE COURT: Yes.

MR. COLICCHIO: Thank you, Mr. Hook.

REDIRECT EXAMINATION BY MR. HOULIHAN:

Q. Mr. Hook, you were just shown a three page statement, which I believe is dated July 28, 1976, by Mr. Colicchio, and he asked you some questions concerning it --

THE COURT: He used the date July 17.

MR. HOULIHAN: That was the date of the interview, yes, your Honor.

BY MR. HOULIHAN:

Q. Is there anything on there, is your signature on that document?

A. No, sir.

Q. And prior to the date that that was handed to you by Mr. VanZant -- when did he give that to you -- you said he gave it to you prior to testifying here?

A. Yes, sir, I believe it was -- what day was it that I come in?

Q. I believe the first time you appeared here was Wednesday.

A. Wednesday, that was the day, sir.

Q. Now, had you seen that document before that?

A. Yes, sir.

Q. When did you see it before?

A. Just before my testimony, a few days before my testimony.

Q. This week, this week's testimony, is that what you mean?

A. Yes, sir.

Q. Did you see it prior to that time?

A. No, sir.

Q. Were you ever asked by Mr. VanZant to read that over and expand on it or reduce it in any way?

A. No, sir.

Q. Is there anywhere in that document that shows that you were asked by Mr. VanZant how long you had known Mr. Yagy?

A. No, sir.

Q. Is there anywhere in that report that report that shows that you were asked by Mr. VanZant whether you ever gambled with Mr. Yagy?

A. No, sir.

Q. Is there anything in that report that shows that Mr. VanZant ever asked you whether you had a gambling debt with Mr. Yagy,

A. No, sir.

Q. Is there anything in that report that shows that Mr. VanZant ever asked you whether Mr. Yagy introduced you tc a James Lord?

A. No, sir.

Q. Specifically, Mr. Colicchio referred you to one sentence here that says, "Hook indicated immediately after the bank robbery they drove O'Brien's blue Chevrolet Nova to the Flagship Hotel in Rochester where they entered the room and counted the money, and all received their share of the proceeds of the robbery." He asked you about that, is

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that right?

A. Yes, sir. It is in that statement, yes.

Q. Is there anywhere in that statement that shows how many questions Mr. VanZant asked you in getting that particular response?

A. No, sir.

Q. Mr. VanZant has spoken to you a number of times, hasn't he?

A. Yes, sir.

Q. And the first interview that you had with him was around July 19, 1976, do you recall that?

A. It was near that time, sir.

Q. Okay. I show you a document here dated July 28, 1976, and I call your attention to the second page, and does it say -- I refer you to the next to the last paragraph.

A. Would you like me to read the last paragraph?

THE COURT: To himself?

MR. HOULIHAN: Pardon?

THE COURT: Do you want him to read it to himself?

MR. HOULIHAN: Yes, your Honor.

THE WITNESS: Okay.

BY MR. HOULIHAN:

Q. Okay. Anywhere in that statement does it say specifically when the money was split?

A. Yes, sir.

Q. And does that statement show that the money was split after you left the Flagship Hotel?

A. Yes, sir.

Q. And it indicates that it was split when Lord and Schwartz arrived at Yagy's house?

A. Yes, sir.

MR. COLICCHIO: I object to the form of the question. I would ask to have the witness read the statement as typed.

MR. HOULIHAN: That would be fine, your Honor. I would just a soon have him read it.

THE COURT: If I understand it, you want the statement read?

MR. COLICCHIO: May I approach the bench a moment?

THE COURT: No. If you don't want it read, you have an opportunity to --

MR. COLICCHIO: I am not asking him to read the statement.

MR. KREMER: The defendant Lord objects to it being read.

MR. MOREHOUSE: So does the defendant Schwartz.

THE COURT: You have an opportunity to ask Mr. Hook more questions about it.

MR. COLICCHIO: All right.

BY MR. HOULIHAN:

Q. In any event, Mr. Hook, then the second document that I handed you, this is not a statement signed by you, is it?

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A. No, sir.

Q. There is no quotes around the particular words in that statement?

A. No, sir.

THE COURT: We are dealing, of course, with documents that are not in evidence. Be careful not to get the substance of it in evidence.

MR. HOULIHAN: Thank you, your Honor.

BY MR. HOULIHAN:

Q. And the three page document that Mr. Colicchio showed you before, are there any quotes around any of the words in that first page?

A. No, sir, there isn't.

Q. Are there any quotes around any of the words on the second page?

A. No, sir.

Q. Any quotes around any of the words in the third page?

A. No, sir.

Q. Mr. Hook, you were questioned on cross examination about the times that you went to a social club by yourself --

A. Yes, sir.

Q. -- for the purpose of gambling. Now, would you explain to the Court and the Jury when it was that you -- give me an approximate date when it was that you went by yourself to the social club?

A. After April 9th?

Q. When was the first time that you personally learned that there was such a thing as the social club that you could go and gamble at?

A. During February. Approximately February of '76.

Q. How did you learn that?

A. Mr. Yagy explained to me what a social club was.

Q. When you first went to the social club was anyone with you?

A. Yes, sir, Mr. Yagy. I went with Mr. Yagy.

Q. And prior to April 9th, how many times did you go to the social club, if you can recall?

A. I really can't recall.

Q. And --

A. Several times.

Q. In any event, prior to the bank robbery, the only time you went to the social club was with Mr. Yagy, is that right?

A. I can't say for sure, sir, but as far as I can remember, it was only with Mr. Yagy, but I'm not ruling out the fact I could have gone there alone. I don't remember going alone, but I'm here to tell the truth.

Q. When you went to the social clubs with Mr. Yagy, did you personally sit in on the games and gamble?

A. No, sir.

Q. Would you explain to the Court and Jury how that worked?

A. Well, Mr. Yagy would bring me into the social club, and we had an agreement that when he would gamble, whatever he would gamble, I would have half of. The money he had in his hand that he gambled with was half mine. Sometimes we would lose and go broke, and he would borrow money and say, "I got so much money, do you want half of this to try and get your money back?" Many times I would agree and we would go further on the thing.

MR. KREMER: Your Honor, I would ask that all of that be stricken in view of the fact that that seems to be testimony after the alleged bank robbery. You have already made a prior ruling.

THE COURT: You are talking about prior to the robbery or after?

THE WITNESS: Before the bank robbery.

MR. KREMER: I object on the grounds we seem to have covered all this on direct examination.

THE COURT: Yes, but you went into it quite a lot on your own cross examination.

MR. KREMER: Thank you, your Honor. I will withdraw my objection.

MR. HOULIHAN: Excuse me just a moment, your Honor. May I have Defendant's Exhibit 7, please?

BY MR. HOULIHAN:

Q. Mr. Hook, I show you Defendant's Exhibit 7, which has been previously identified as the minutes of the grand jury, your testimony before the grand jury, and in it I ask you to just -- do you recall your testimony before the grand jury?

A. Yes, sir.

Q. You read this over, did you not, before you testified here?

A. Yes, sir.

Q. Now, did you testify that -- the questions that I asked you in the grand jury, were they in the same detail as the questions I asked you in court here?

A. Nowheres near, sir.

Q. In fact, do you recall how long you were in the grand jury when you appeared?

A. Five minutes.

Q. And how many pages of transcript is contained in --

THE COURT: You can count them.

MR. KREMER: Relevancy, your Honor.

THE COURT: Overruled.

MR. KREMER: Thank you.

BY MR. HOULIHAN:

Q. Fifteen pages of transcript, is that right?

A. Yes, sir.

Q. Now, do you recall that on approximately July 19, 1976 you gave a statement to Special Agent VanZant and a gentleman by the name of Howard Relin, do you recall that?

MR. KREMER: Your Honor, I object at this time. I would like to because of the --

THE WITNESS: Yes, sir.

THE COURT: Wait a minute.

MR. KREMER: I can't state my objection because of the special limitations placed upon it. I have to approach the bench.

THE COURT: Well, we have a simple question at this point. Wait for the next question.

MR. KREMER: Thank you, your Honor.

BY MR. HOULIHAN:

Q. At that time you were asked questions and you gave answers, is that right?

THE COURT: Yes or no.

THE WITNESS: Yes, sir.

BY MR. HOULIHAN:

Q. And there was a reporter there, a court reporter?

A. Yes, sir.

Q. And he took down the answers and the questions?

A. Yes, sir.

THE COURT: Do you want to mark that as an exhibit?

MR. HOULIHAN: Yes, if I may.

THE COURT: That will be Government's Exhibit 19, at least that is the last number I have.

MR. HOULIHAN: I think that is correct, your Honor.

(Thereupon transcript referred to was marked Government's Exhibit 19 for identification.)

BY MR. HOULIHAN:

Q. I show you a transcript marked Government's Exhibit 19, consisting of twenty eight pages --

THE COURT: What was the date of that?

MR. HOULIHAN: July 19, 1976.

THE COURT: Thank you.

BY MR. HOULIHAN:

Q. I call your attention to Page 8 of that, and ask you to read to yourself Line 1 through Line 3.

A. (Witness examines transcript.) Yes, sir.

Q. Now, is that statement identical to what you testified to on direct examination in this courtroom about when you got the money after the bank robbery?

A. Not completely identical but close.

Q. There is more that was said?

THE COURT: Said when?

MR. HOULIHAN: Excuse me.

BY MR. HOULIHAN:

Q. When Mr. Colicchio asked you questions concerning the three page document, and I am referring to the one portion where he read, "Hook indicated immediately after the bank robbery they drove O'Brien's blue Chevrolet Nova to the Flagship Hotel in Rochester, where they entered the room and counted the money, and all received their share of the proceeds of the robbery." He said that was inconsistent to what you testified to in court, is that right?

A. That is correct.

Q. I call your attention to the statement made on July 19th, the one I just asked you to read to yourself.

A. Yes, sir.

Q. That concerns the same subject matter, doesn't it, to some extent?

A. Yes, sir.

Q. About the splitting of the money?

A. Yes, sir.

Q. It says that you left, "I didn't take no money, I left and went to Gerry's house, they came later."?

A. Yes, sir.

Q. Mr. Hook, do you know how long you have known Mr. Columbo who ran the gas station?

A. Yes, I know him three and a half years.

Q. And is he a friend of yours?

A. Yes, sir.

Q. And the times that you took money from the cash register, most of the time you returned it before seven o'clock the next morning?

A. All but one time, sir.

Q. What happened that one time?

A. Well, I told Mr. Columbo, he was understanding, said, "Don't worry about it." I told him I would have the money by four o'clock. He said, "Okay, I wish you would have told me first, you know if you need money I am always here."

Q. And did you give him the money back?

A. Yes, sir, I did.

Q. Mr. Hook, have you testified truthfully in this courtroom?

A. Yes, sir.

MR. HOULIHAN: Thank you. No further questions.

THE COURT: Mr. Kremer?

MR. KREMER: Lord has no questions, your Honor.

MR. COLICCHIO: No questions.

MR. MOREHOUSE: Schwartz has no recross, your Honor.

THE COURT: Thank you, Mr. Hook.

(Witness excused.)

THE COURT: Is your next witness here?

MR. HOULIHAN: Yes, your Honor. Richard Berry.

RICHARD K. BERRY, One Sheraton Plaza, New Rochelle, New York, called as a witness on behalf of the

Government, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HOULIHAN:

Q. Mr. Berry, by whom are you employed?

A. The Federal Bureau of Investigation.

Q. How long have you worked for the FBI?

A. Sixteen years.

Q. And where is your duty station?

A. New Rochelle, New York.

Q. Did there come a time in the course of your duties as a special agent of the FBI that you arrested Gerhard Schwartz?

A. Yes, sir.

Q. And when was that?

A. November 22, 1976.

Q. And immediately upon his arrest was he advised of his constitutional rights?

THE COURT: Don't lead.

THE WITNESS: Yes, he was.

BY MR. HOULIHAN:

Q. Calling your attention now to the same day, November 22, 1976, did there come a time that you interviewed Gerhard Schwartz?

A. Yes, there did.

Q. Where did the interview take place?

A. In the New Rochelle Office of the FBI.

Q. And prior to that interview what, if anything, did you tell him about his constitutional rights?

A. Prior to the interview I furnished a form, FD-395, which states all the constitutional rights.

Q. And did you give that to him?

A. Yes, sir, I handed that to Mr. Schwartz, he read it, and he subsequently signed it.

MR. KREMER: I object on behalf of the defendant Lord, and move to renew the original written motion which I have previously made, which had been denied.

THE COURT: All right. Nothing has been said as yet about the event we are trying here. I assume when we get to that you want this not to be charged against or applied against Mr. Lord?

MR. KREMER: No, your Honor, more than that. I wish to renew that previous motion, and I also wish to --

THE COURT: The one we talked about at recess?

MR. KREMER: That one, too, and in addition to that --

THE COURT: I reserved on that motion that we talked about at recess. The earlier one I have dealt with and without prejudice to your position on any such motion, I will deny it at this time, and allow you to renew at a proper moment when we can talk about it.

MR. KREMER: So as not to disrupt Mr. Houlihan's examination, may this be a continuous objection?

THE COURT: Which motion?

MR. KREMER: Both.

THE COURT: All right, very good.

MR. COLICCHIO: The defendant Yagy joins in the motions.

THE COURT: This is the motion we talked about at recess?

MR. COLICCHIO: That and one of the motions made yesterday or the day before, regarding the statements taken from Mr. Schwartz in the circumstances under which they were taken.

THE COURT: Yes, all right.

MR. COLICCHIO: The application, of course --

THE COURT: Go ahead, let's go along. You have an exception to my ruling on that motion, and the exception will stand.

MR. HOULIHAN: Excuse me, your Honor. May we approach the bench for a sidebar?

THE COURT: Well, let me deal with Government's Exhibit 6, per se, this is what you are going to do, and then if you come to a point of offering something, of course, you will come down to part of it, is that your question?

MR. HOULIHAN: Yes, your Honor, also defense attorneys have been provided with copies of this, and I don't know if they have any objection to it.

THE COURT: What number is that?

MR. HOULIHAN: Government's Exhibit 6(a).

THE COURT: They have indicated, as far as the mechanical restructuring that we have talked about on the record, but in the absence of the jury, the defense counsel have indicated they have no objection to the way it is now set up.

BY MR. HOULIHAN:

Q. Mr. Berry, I show you Government's Exhibit 6 marked for identification, is that the Form 395 that you just testified to?

A. Yes, it is.

Q. What time was that given to Mr. Schwartz?

A. It was given to Mr. Schwartz at 10 A.M.

Q. And what time did he sign it?

A. He signed it at 10:04 A.M.

Q. And did you see him put his signature on that?

A. Yes, sir.

THE COURT: What you are talking about is the top sheet, is that correct?

MR. HOULIHAN: The top sheet, yes.

THE COURT: Government's Exhibit 6, which you have handed to him, is multi-paged?

MR. HOULIHAN: Yes, your Honor.

THE COURT: Go ahead.

BY MR. HOULIHAN:

Q. And your signature appears here as a witness?

A. That is correct.

Q. Do you see Mr. Schwartz in the courtroom?

A. Yes, sir, I do.

Q. Would you point him out?

A. Mr. Schwartz has the crew cut, wearing a tan suit jacker with a white and brown shirt that is opened at the neck.

Q. Did you have a conversation with him at that time?

A. Yes, I did.

Q. That was after he signed the first page of Government's Exhibit 6?

A. Yes, sir.

Q. Did there come a time that Mr. Schwartz gave you -- strike that, please. Would you tell us whether you had a conversation with Mr. Schwartz at that time concerning his involvement with the bank robbery of the Columbia Savings & Loan Association in Rochester?

A. Yes, sir, I did.

Q. Subsequent to that conversation did Gerhard Schwartz give you a signed statement concerning his involvement in that Columbia Savings Bank robbery on April 9, 1976?

A. Yes, he did.

Q. I show you Government's Exhibit 6(a) marked for identification the first page being a copy of the first page of Government's Exhibit 6, the 395?

A. That is correct.

Q. Referring now to the second page of Government's Exhibit 6(a), is that the statement that Mr. Schwartz gave to you on that date?

A. Yes, it is.

Q. And that is his signature that appears on the bottom?

A. Yes, sir.

Q. That was signed in your presence?

A. Yes, sir, it was.

Q. And you witnessed that with your signature down here?

A. Yes, I did.

Q. And there were two other FBI agents as well that witnessed that?

A. Yes, sir, that is correct.

MR. HOULIHAN: I offer Government's Exhibit 6(a).

THE COURT: Mr. Morehouse?

MR. MOREHOUSE: I respectfully request --

THE COURT: Do you want to ask any questions of the witness?

MR. MOREHOUSE: I would like to ask some preliminary questions, please --

THE COURT: All right, go ahead.

MR. MOREHOUSE: -- pertaining to the execution of this instrument.

THE COURT: Go ahead.

PRELIMINARY EXAMINATION BY MR. MOREHOUSE:

Q. Mr. Berry, did Mr. Schwartz execute any other papers for you?

A. No, sir.

Q. You said the waiver of rights, advise of rights form, was signed at 10:04 A.M.?

A. That is correct.

Q. The morning of the arrest?

A. Yes, sir.

Q. When do you say Page 2 of Government's Exhibit 6(a) was signed by Mr. Schwartz, what time of day on the 22nd?

A. I have a log that was maintained, if I see the log I can tell you.

Q. I have a copy of the log, I will show it to you.

MR. COLICCHIO: May I approach Mr. Houlihan?

THE COURT: Yes.

(Thereupon an off the record conference ensued between Mr. Colicchio and Mr. Houlihan.)

MR. COLICCHIO: May I approach the bench a moment? It has nothing to do directly with the proof.

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(Thereupon an off the record discussion ensued at the sidebar.)

BY MR. MOREHOUSE:

Q. Do you want to refer to that, Mr. Berry?

A. What was your question?

Q. I was asking when do you say Mr. Schwartz signed the second sheet of Government's Exhibit 6(a)?

A. Yes, sir.

Q. When?

A. At 1:45 P.M.

Q. On that same day?

A. On that same day.

Q. That would account for -- the time lapse would account for the transcription and typing, and so forth?

A. That is correct, and processing.

Q. Does this second page of this same exhibit contain all the conversation which took place prior to the execution of this instrument, all the conversation you had with Mr. Schwartz?

A. No, sir.

Q. Just an excerpt of various parts of the conversation reduced to writing, is it?

A. No, sir. I don't understand your question.

THE COURT: Let me ask you, does this contain everything that Mr. Schwartz said about his own implication in the April 9, 1976 bank robbery of the Columbia Savings & Loan Association?

THE WITNESS: Yes, sir, it contains everything he said concerning that bank robbery.

BY MR. MOREHOUSE:

Q. Everything he said to you?

THE COURT: About his own involvement?

THE WITNESS: About his own involvement.

BY MR. MOREHOUSE:

Q. Everything he said to you concerning the preparation of this, the reason for the execution, and everything, is all contained on the second page of the exhibit?

A. Yes, sir.

Q. You had other conversation with Mr. Schwartz, did you not?

A. Yes.

Q. Between eight thirty that morning and ten-o-four that morning?

A. Yes, sir.

Q. Where are those conversations recorded, sir?

THE WITNESS: Your Honor --

THE COURT: Do you want to look at Government's Exhibit 6?

MR. HOULIHAN: I think it is this one.

MR. MOREHOUSE: What is going on?

MR. COLICCHIO: Your Honor, may I approach Mr. Morehouse a moment, please?

THE COURT: We will recess for ten minutes, ladies and gentlemen.

(Thereupon the jury exited the courtroom at 2:55 P.M.)

THE COURT: Mr. Morehouse, our problem is obvious to the witness. I can see why he has difficulty answering. Obviously, we are talking about one of six statements that he gave.

MR. MOREHOUSE: I'm sorry. I didn't show it to him, he doesn't know what I'm talking about.

THE COURT: Right. There may be a 302 that reflects that, like Government's Exhibit 10, which has this statement set forth and then extra material.

MR. MOREHOUSE: All I'm trying to do is get out of Berry the testimony that this is the only recorded transcript of conversation he had with Schwartz, as to Schwartz.

THE COURT: Every time you ask that you should say, 'About Schwartz's involvement in the bank robbery,' limit it to his involvement in the bank robbery.

MR. MOREHOUSE: Right, I don't want to get the other guys in.

THE COURT: If you ask it that way, he can answer it, his own involvement in the bank robbery.

MR. MOREHOUSE: Okay.

THE COURT: If the question comes into you that way, you will have no problem handling it, as long as it is Schwartz's involvement in the bank robbery?

THE WITNESS: His alone.

THE COURT: Yes, Schwartz's own involvement in the bank robbery.

THE WITNESS: Yes, sir. It's the way the question was asked.

THE COURT: I know.

(Thereupon the court was in recess at 3 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3:05 P.M.

(Defendants present, counsel present, jury present.)

RICHARD K. BERRY, called as a witness on behalf of the Government, and having been previously duly sworn, resumed and testified further as follows:

THE COURT: All right, Mr. Morehouse.

PRELIMINARY EXAMINATION BY MR. MOREHOUSE (Cont'd.):

Q. Okay. In your conversation with Mr. Schwartz, as involving Mr. Schwartz only, did you and he have a talk about a rule known as Rule 20 in the Federal Rules of Criminal Procedure?

A. Yes, sir, we did.

MR. MOREHOUSE: I have no objection to the execution of the instrument, I do object to its content, of course. I want to reserve my rights as to the content and execution.

THE COURT: All right. Mr. Kremer, what is your position on Government's Exhibit 6(a)?

MR. KREMER: It will take me two seconds, your Honor. In view of my prior objections, I am caught in a dilemma. If I cross examine, I thereby give assent to -- I thereby dilute the force of the motions which I have previously made. If I do not, if I do not cross examine --

THE COURT: You are talking about your cross examination relative to the offer of 6(a) in evidence?

MR. KREMER: Yes, your Honor. If I do not, I cannot make the additional motion based upon the same grounds that Mr. Colicchio made with respect to times, speaking euphemistically.

THE COURT: I don't think that would prejudice you at all. You could ask concerning anything about the voluntariness of 6(a) and other aspects of it if you wanted to. I want to find out your position. We have an offer of 6(a) in evidence. Mr. Morehouse has examined concerning it, and I want to find out what your position is.

MR. KREMER: I will have to cross examine, your Honor, based upon your next most immediate ruling.

THE COURT: Go ahead.

PRELIMINARY EXAMINATION BY MR. KREMER:

Q. There came a time, did there not, when you arrested Mr. Schwartz?

A. Yes, sir.

Q. That was at what time, sir?

A. 8:35 A.M.

Q. That was in the morning, correct?

A. That is correct.

Q. And at what time did you finally take him to a U.S. Magistrate to be arraigned, if you did?

A. I accompanied the car which Mr. Schwartz was in to the United States Attorney's Office, arriving there at 3:07 P.M.

Q. What time was Mr. Schwartz arraigned?

A. I wasn't there when he was arraigned, sir.

Q. Do your records show what time he was arraigned?

A. 4:37 P.M.

Q. 4:37 P.M., and he was arrested, as you say, at 8:35 A.M., correct, sir?

A. That is correct.

Q. And he was arrested in the Bronx, wasn't he?

A. That is correct.

Q. From the Bronx he was transported to New Rochelle?

A. That is correct.

Q. And New Rochelle is in what county?

A. Westchester County.

Q. Now, Westchester County is north of the Bronx, isn't it?

A. That is correct.

Q. And it is north of Manhattan County, isn't it?

A. That is correct.

Q. Now, Manhattan County is actually the Island of Manhattan?

A. That is correct.

Q. And is it not a fact that it is, within two or three miles, approximately equi-distant from New Rochelle, New York, your office, from the Bronx, where Mr. Schwartz was arrested, to Foley Square in Manhattan where the magistrate is?

A. It is closer to New Rochelle, yes.

Q. Closer to New Rochelle?

A. Yes.

Q. You did not choose -- when I say you, I mean your group of officers -- did not choose to take him immediately to

Manhattan, but chose instead to take him to New Rochelle?

A. To be processed, yes, sir.

Q. But to New Rochelle, correct?

A. Yes, it was more expedient to take him to New Rochelle due to the traffic conditions.

Q. I see. Now, you are aware of the fact that it is the obligation of the FBI to take an arrested person to the U.S. Magistrate as soon as possible, correct?

A. That is correct.

Q. And this is something that you have been taught to observe, correct?

A. Correct.

Q. From 8:37 A.M. until 4:33 P.M. is how much time?

THE COURT: About eight hours.

MR. KREMER: Thank you, your Honor.

BY MR. KREMER:

Q. Is that comport with your idea?

A. I agree with his Honor.

Q. Thank you, Agent Berry. Now, the statement, that is, Government's Exhibit 6(a), was taken at New Rochelle, correct?

A. That is correct, sir.

Q. It was taken before the arraignment, correct?

A. That is correct.

MR. KREMER: Thank you, sir.

THE COURT: Your position on 6(a)?

MR. KREMER: My position is that it is in violation of the rules made for the prompt arraignment of criminal defendants, that the statement itself is illegally obtained, it should be suppressed.

THE COURT: Mr. Colicchio, do you have a position?

MR. COLICCHIO: Our position is the same. I would like to ask several questions of this witness.

THE COURT: You may.

PRELIMINARY EXAMINATION BY MR. COLICCHIO:

Q. Agent Berry, is there a U.S. Magistrate in Bronx County?

A. No, sir.

Q. And the closest magistrate for Bronx County is where?

A. It would either be in White Plains or in Manhattan.

Q. How far is it from the Bronx where the defendant Schwartz was arrested to Foley Square in Manhattan, approximately?

A. I would estimate it to be about twelve miles, fourteen miles.

Q. The U.S. Magistrate in Manhattan would be at Foley Square?

A. That is correct.

Q. The other magistrate is located in White Plains?

A. Westchester County, White Plains.

Q. And New Rochelle is in Westchester County?

A. In Westchester County.

Testimony of Special Agent Richard K. Berry, dated 2-11-77.

Q. White Plains is how far from New Rochelle?

A. Approximately the same distance -- from New Rochelle itself?

Q. Next door, isn't it?

A. It is about six or seven miles.

Q. How far is the Bronx where Mr. Schwartz was arrested to your office at New Rochelle?

A. It is approximately ten miles.

Q. And is White Plains north of New Rochelle?

A. Yes, it is.

Q. An additional six?

A. Yes, sir.

Q. And at the time Mr. Schwartz was arrested he was under indictment, is that correct?

A. Yes, sir.

Q. You are aware, sir, of Rule 9 of the Federal Rules that states that a man arrested who is under indictment must be brought promptly -- it uses the word "promptly" -- before the United States Magistrate for arraignment, is that correct?

A. Yes, sir.

Q. And did you attempt to bring Mr. Schwartz to the magistrate in White Plains?

A. A call was made up there, as far as I can recall, and the magistrate wasn't available on the date Mr. Schwartz was arrested.

Q. And did your men drive to Foley Square in Manhattan immediately after Mr. Schwartz was apprehended, with Mr. Schwartz?

A. No, sir, he had to be processed.

Q. Is there a Bureau Office in Manhattan?

A. Yes, there is.

Q. Is it also down in Foley Square?

A. No, sir.

Q. Near Foley Square?

A. No, sir.

Q. On the way to Foley Square?

A. It is in midtown Manhattan.

Q. On the way to Foley Square?

A. On the way to Foley Square.

Q. North of Foley Square, isn't it?

A. No, sir, it is midtown, 69th Street.

Q. A short distance from Foley Square?

A. A good five miles.

MR. COLICCHIO: Your Honor, I also join in the position of Mr. Kremer, as I had previously, that the statement of defendant Schwartz is a statement obtained under circumstances in complete violation of Rule 9 of the Federal Rules of Criminal Procedure, which states implicitly, it uses the word "promptly" and we have an eight hour delay between the arrest and arraignment.

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MR. MOREHOUSE: Your Honor, defendant Schwartz joins in the motions. Counsel was not sure that such testimony was receivable under the preliminary questioning, as to the execution of the instrument or not, and therefore I declined to so question, but I join in the motion along with the other gentlemen.

THE COURT: All right. As I understand it, Mr. Berry, you have indicated that Mr. Schwartz at some point had been advised of his rights, and then at some later point he was handed this Form 395, which you said he read and he signed?

THE WITNESS: That is correct, your Honor.

THE COURT: And now, being cognizant of the various constitutional rights, and what is contained in 395, I know that one of those rights that he was advised of was his right to have an attorney before he said anything, the right to have one appointed in case he was unable to hire one, and also that he need not say anything if he chose not to, and anything he said, of course, could be used against him, is that correct?

THE WITNESS: That is correct, your Honor.

THE COURT: Is that all set forth in 395?

THE WITNESS: Yes, your Honor.

THE COURT: And I ask you whether or not Mr. Schwartz at any time prior to the time when he gave the statement or the information, which is incorporated in Government's Exhibit 6(a), indicated either his refusal to give any information or his request for having any attorney to represent him before he gave any such information?

THE WITNESS: He did not make any such request, he did not refuse to give any information.

THE COURT: All right, thank you. Does anybody want to ask anything about that?

MR. KREMER: The defendant Lord does not desire to cross examine with respect to that.

THE COURT: I will admit in evidence Government's Exhibit 6(a).

(Thereupon Government's Exhibit 6(a), previously marked for identification, was received and marked in evidence.)

THE COURT: You may read it to the jury if you want to, Mr. Houlihan.

MR. KREMER: The defendant Lord excepts, and renews his previous motion.

THE COURT: Same ruling.

MR. HOULIHAN: Government's Exhibit 6(a) --

THE COURT: Read it to the jury.

MR. HOULIHAN: The first page, "Before we ask any questions you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer." Then below that, "I have read this statement of my rights, and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me, and no pressure or coercion of any kind has been used against me." Signed Gerhard Schwartz, with witnesses.

Testimony of Special Agent Richard K. Berry, dated 2-11-77.

Page 2: "I, Gerhard Julius Schwartz, make the following free and voluntary statement to Robert A. Martineau, Richard K. Berry and William F. Hutton III, who have identified themselves to me as special agents of the Federal Bureau of Investigation. No threats or promises have been made to me. During the first week of April 1976, I entered the Columbia Bank, located on Mt. Hope Avenue, in the Mt. Hope Shopping Plaza, in Rochester, New York, and robbed that bank. During the robbery I carried a .12 gauge shotgun loaded with two shotgun shells, and was dressed in green coveralls, woman's pantyhose for a mask, and wore gloves. After entering the bank I told everyone to lie down on the floor, and then I proceeded to go along to each of the tellers' drawers and remove cash and place it in a pillow case. After the robbery I left the bank in an old model Buick, and approximately two blocks from the bank I switched to a second car. Taken during the above mentioned robbery was approximately $38,000. I disposed of the shotgun used in the above robbery by throwing it in the Genesee River in Rochester, in the vicinity of Plymouth Avenue. I, Gerhard Julius Schwartz, have read the above statement consisting of this page, and now sign it because it is true. I have initialled any corrections that were necessary. I have also initialled and dated --" signed Gerhard Schwartz, and witnessed by three people.

MR. KREMER: I will have a motion to make later this afternoon. Thank you, sir.

BY MR. HOULIHAN:

Q. Special Agent Berry, during the time that you were interviewing Mr. Schwartz, did he have anything to eat?

A. Yes, sir, he did.

Q. Did you provide that for him?

A. Yes, he was provided with a cup of coffee, also provided with a McDonald's hamburger and a milkshake.

Q. Now, prior to the time -- you brought him to Foley Square at approximately what time?

A. We arrived at the United States Attorney's Office in Foley Square at 3:07 P.M.

Q. Now, prior to the time you arrived, did you have to stop someplace else?

A. Yes, sir, we had to stop in the New York Office of the FBI.

Q. What was the purpose of that stop?

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A. The purpose of that stop was to have a photograph of Mr. Schwartz taken because our camera malfunctioned in New Rochelle.

Q. At the time that you arrived at Foley Square, did you have a conversation with Mr. Schwartz regarding how he was treated while he was with you agents?

A. Yes, sir. When we arrived at Foley Square I shook hands with Mr. Schwartz, and he remarked that he had been treated like a gentleman, and I told him that the next time he saw me I would be testifying against him. I also reminded him to ask his attorney to fully explain the Rule 20 procedure to him.

Q. Now, at the time that Mr. Schwartz's photograph was taken were you present?

A. Yes, sir.

Q. And did you see him when the photograph was taken?

A. Yes, sir.

Q. I show you Government's Exhibit 17, can you identify that?

A. Yes, sir, this is the photograph of Mr. Schwartz on the day of his arrest, November 22, 1976.

Q. And the way Mr. Schwartz is shown in that photograph, does that fairly and accurately depict the way he looked on the day of the arrest?

A. Yes, sir.

MR. HOULIHAN: I offer Government's Exhibit 17.

MR. MOREHOUSE: No objection, your Honor.

MR. KREMER: Lord objects, your Honor, on the same general grounds, which I will elucidate later.

MR. COLICCHIO: The same on behalf of the defendant Yagy, your Honor. I am reserving our motion until later.

THE COURT: Subject to any later motions, I will receive Government's Exhibit 17.

(Thereupon Government's Exhibit 17, premarked for identification, was received and marked in evidence.)

BY MR. HOULIHAN:

Q. Now, Mr. Berry, subsequent to the time that Mr. Schwartz gave you the written statement that has been admitted, Government's Exhibit 6(a), did you have a conversation with him concerning the way he looked?

A. Yes, sir.

Q. Would you tell us what you said?

A. I inquired of Mr. Schwartz why he had the long hair and the beard, since I had been informed that he generally had a crew cut. Mr. Schwartz --

MR. KREMER: Lord objects.

MR. MOREHOUSE: I object to 'generally informed,' your Honor.

THE COURT: Yes, the jury will ignore that.

MR. KREMER: Lord objects on the grounds of relevancy, outweighed by the prejudicial effect of it to the defendants seated here at the table.

THE COURT: No. Obviously what we are talking about, we are back into the cubicals, cubbyholes and departments. All of this applies to Mr. Schwartz only, not to Mr. Yagy or Mr. Lord.

MR. KREMER: Exception, your Honor.

MR. COLICCHIO: Exception, your Honor.

BY MR. HOULIHAN:

Q. What, if anything, did he tell you?

A. Mr. Schwartz told me that he grew the long hair and beard once he fled Rochester to come to New York City.

MR. KREMER: The same objection by Lord.

THE COURT: The same ruling.

MR. HOULIHAN: No further questions.

THE COURT: Mr. Kremer.

MR. KREMER: The defendant Lord does not desire to cross examine, your Honor.

THE COURT: Mr. Morehouse?

CROSS EXAMINATION BY MR. MOREHOUSE:

Q. Mr. Berry, it is my practice in criminal cases to find out who the arresting officer was, was it you?

A. There were five of us in the apartment.

* * * * * *

THE COURT: I am still, yes.

MR. COLICCHIO: I am trying to find an answer to the jurisdictional question.

THE COURT: There is no harm or risk to anyone, if I don't have jurisdiction, no conviction would stand.

(Thereupon the jury entered the courtroom at 5 P.M.)

THE COURT: Ladies and gentlemen, among the matters we have been dealing with while you were out of the room, I have two things I need to tell you about now. Along with my direction to you that all of this testimony about what happened after the date of the robbery, when you remember there was some testimony about gambling and partnership gambling, and that went out of the case, I clarified that this morning by indicating that this did not take out of the case the alleged partnership gambling that happened earlier. I need to refine that ruling a little further, not as far as the gambling, but what went out of the case also was whatever evidence there was of a meeting in front of the pizzeria store after the robbery on a day subsequent to the robbery, among Mr. Hook, Mr. Yagy and Mr. Lord, and any conversation there or any statement made there concerning any pressure or supposed pressure by the police upon Mr. Hook. Those two facets also are out of the case, along with the partnership gambling. Further, as a matter of law, I have decided that one of the three counts in the indictment cannot be supported by a verdict of guilty as to Mr. Yagy, this is Count 2, and I will tell you more about that, about the elements involved in the various counts when I get to the point of instructing you on the law, but there is no evidence, of course, that Mr. Yagy was present at the bank during the robbery. Count 2 requires -- or one element of it is that there be a use of a dangerous weapon at and during the robbery, and there is no evidence in the case from which you could find that he, Mr. Yagy, prior to the robbery knew of the intended use of a weapon. There is just the tiniest little bit in there, but as a matter of law that is not enough, so Count 2 is out of the case, as far as Mr. Yagy is concerned, and it remains in the case as far

* * * * * * *

COURT'S CHARGE AT CLOSE OF EVIDENCE, dated 2-11-77.

THE COURT: All right. No rebuttal, Mr. Houlihan?

MR. HOULIHAN: No rebuttal, your Honor.

THE COURT: All right. That closes the evidence. As far as exhibits which are in evidence, I have received Government's Exhibit 1, Government's Exhibit 3, Government's Exhibit 4, Government's Exhibit 6(a), Government's Exhibit 17, Government's Exhibit 18. The evidence is closed, ladies and gentlemen. Now what remains is the matter of having the attorneys argue to you in summation as to what each feels has been proven or not proven by the evidence, and then my giving you the instructions and then, of course, your having your deliberations. Now, again with apologies, I have to do this tomorrow morning, so you can come in -- is nine o'clock a convenient hour? Come in at nine, we will start with the closing arguments right away and the summations, and then you will have the matter for decision. I apologize for the Saturday work in advance, but it is necessary in these circumstances. We will see you tomorrow at nine. Even though you have heard all the evidence now, still keep your minds open and undecided on these various issues, particularly the issue of guilt or innocence, until you have heard the attorneys and until you have heard my instructions, and until you are all together, and then you will be making up your minds. Do not talk among yourselves about it, and do not talk with anybody else. Avoid reading any items in the newspaper or listening to any items on radio or any items on television concerning the case. I will see you tomorrow at nine o'clock.

(Thereupon the jury exited the courtroom at 6:15 P.M.)

THE COURT: Unfortunately, I am not going to be in a position to tell you with particularity what I have done with your requests until the first thing in the morning. I have my charge here, but I, myself, have got to work on that. I have your requests and, of course, my clerk has had your requests, he has had them in mind. It bears really only heavily upon Mr. Houliha, who is the first off. If the rest of you know prior to his argument

* * * * * *

MOTIONS AND RULINGS AT THE CLOSE OF EVIDENCE, dated 2-12-77.

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 9:10 A.M.

(Defendants present, counsel present, jury absent.)

MR. HOULIHAN: Your Honor, prior to recess yesterday I think Mr. Kremer pointed out that there were some references in Government's Exhibit 6(a) that refer to "this page and four other pages," and also that Gerhard Schwartz dated and initialled each of the four previous pages. When I read that to the jury, when I came upon it, I decided that I would not read it to them. In view of the fact that I did not read this to them, and the motions for severance that have been made, I would join in his motion to have that portion redacted. I have done that by use of a black pen marking over that particular portion and --

THE COURT: On 6(a) or another copy?

MR. HOULIHAN: On another copy, 6(a) is still in tact. It reads, "I, Gerhard Julius Schwartz, have read the above statement consisting of this page, and now sign it because it is true. I have initialled any corrections that were necessary.

I have initialled and dated," then there is black after that.

THE COURT: Has everyone seen it?

MR. HOULIHAN: No, I haven't shown it to them.

THE COURT: All right. Now, supposing that we remove the face sheet of the two sheets which are 6(a), of course, the exhibit number is on that Advice of Rights and Waiver of Rights, and reattach that to the changed page that Mr. Houlihan is now showing you. Would that be all right, and for the record we will mark the sheet that I have detached as 6(g).

MR. HOULIHAN: G-6(a)(1)?

THE COURT: Government's Exhibit 6(f). (f) we have already?

MR. HOULIHAN: Yes.

THE COURT: (g), that will preserve it.

(Thereupon document referred to was marked Government's Exhibit 6(g).)

THE COURT: Staple those together, they will become 6(a).

MR. HOULIHAN: Thank you, your Honor.

THE COURT: Does everyone know what I have done?

MR. KREMER: Yes, your Honor. I have something for the record.

THE COURT: All right.

MR. KREMER: Are you set?

MR. HOULIHAN: Yes.

MR. KREMER: Your Honor, I would like to again renew the motion for a mistrial based upon the facts, the new facts as follows. Last night you stated to the jury that there was no evidence that Mr. Yagy was present at the robbery, no evidence that Mr. Yagy prior to the robbery knew of the intended use of the weapon. Having made that decision, and having admitted Exhibit 6(g) into evidence, the jury must inexplicibly --

THE COURT: 6(a) in evidence? You mean -- you are talking about the reference to the other sheets?

MR. KREMER: The Schwartz confession. Having admitted that in evidence as Government's Exhibit 6(g) or whatever it is, the jury must by process of elimination, having known that you have ruled Mr. Yagy was not there, and having Mr. Schwartz confess in essence that he was there, and there are three people here, the jury has to put Mr. Lord at the scene, and therefore based upon the substantial prejudice to my client, cumulative the past several days, I would again renew my motion for a mistrial as far as defendant Lord is concerned. It is respectfully submitted that the case should have been severed along time ago, that the confession of Mr. Schwartz has caused substantial taint to the situation, and for that reason I renew the motion for a mistrial.

THE COURT: I will deny that. On that basis I am denying it. I have been also reserving on a mistrial generally, and that is a motion made by Mr. Colicchio, on behalf of Mr. Yagy, and the motion made by Mr. Kremer, on behalf of defendant Lord, and I am now denying those two motions for a mistrial. I find that there has been a minimal amount of contamination by other events in the case. There obviously have been during voir dire the reference by the Government to stabbing. There had been a reference by Mr. Hook in his testimony to -- he phrased it as "I unfortunately," or something like that, and once or twice when a question was put to him, he turned to me and said, 'You don't want me to get into that, your Honor?' As I remember, that is about the sum and substance of the other events. We did have the testimony about events following the bank robbery, the conference in front of the store, and the supposed police pressure upon Hook, and the request to leave town, and the partnership gambling. I am not sure whether there was testimony about the question of leaving town, I think there was, but I leave that to the record. All of that has gone out. I think the jury has been fairly and adequately instructed on that, as a matter of fact, through the original instructions, and the change in that so that they were told again that the post robbery partnership gambling went out, but not the pre-robbery partnership gambling, and then later they were told expressly that along with the post robbery partnership gambling that the post robbery meeting in front of the store and any conversations there was out. I think that is emphasized to them that they are not to consider it.

MR. KREMER: If the Court please, I am sorry to interrupt, but there was post robbery testimony when Mr. Hook said that Mr. Lord would produce a doctor who would testify at the trial that he had a

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bad foot or a bad leg, and I moved for a mistrial at that point, and continued my motion for that mistrial based upon that substantial prejudice. My motion still stand with respect to it, and I would like a separate ruling on it, your Honor.

THE COURT: Yes. Well, I haven't told the jury anything about that. I can't remember what we did on that.

MR. KREMER: We did nothing.

MR. HOULIHAN: My recollection is that the testimony was struck at the time.

MR. KREMER: My recollection is that the testimony was not struck, your Honor. I would defer to the record.

MR. HOULIHAN: In addition, your Honor, I think it may be argueably proper in the sense that Mr. VanZant's interview with Mr. Lord on the date of the bank robbery, Mr. Lord did say that he had a sore foot, and so it may well be added to that portion.

THE COURT: Well, I don't remember, in my notes do not show whether that was struck. There would be grounds for it staying in, and probably grounds for it going out, and whichever way it went, I don't think is of any materiality at this point. Again, I don't view that as a matter of substantial prejudice to Mr. Lord, rather any prejudice in the case that in fact cannot legitimately be there.

MR. KREMER: You are denying the motion?

THE COURT: I am denying the motion, yes.

MR. KREMER: Exception.

THE COURT: Of course, for the record only, what we have been talking about and what the reference is, of course, is that in addition to what has been testified about relative to the bank robbery, that there allegedly or supposedly did come about after the bank robbery, the robbery of another place of business, namely, a Wegman's Supermarket which, as far as I am able to deduce, and admittedly from my examination of many of the documents that have been produced by the District Attorney and by the Rochester Police Department, by the Monroe County Sheriff, where they have that robbery under prosecution and also the event of the stabbing, which I will refer to later, under prosecution, I know that in that situation it seemingly involved Mr. Yagy, who persuaded Mr.

Hook to enlist the assistance of an employee of the supermarket who was in a position to have a key, and that pursuant to that, Mr. Schwartz went into the supermarket, and I am not sure whether Mr. Yagy went in or not, but there was a robbery of the Wegman's market. Evidently, and I get this more from perhaps argument here in court than from those other papers, seemingly the spotlight of suspicion focused upon that supermarket employee, and there evidently came to be a great fear that this would expand to bring Mr. Hook into the investigative limelight and, consequently, there was at a later time a conference in front of the pizzeria store, where Mr. Lord and Mr. Yagy and Mr. Hook were talking, and it was suggested that Mr. Hook remove himself from the local area so that he would not be subjected to this police pressure and interrogation, and then later Mr. Hook advised that he could not or would not leave, and there was some question through this period of Mr. Hook wanted or trying to get some amount of money from Mr. Yagy, and there came a time when Mr. Yagy supposedly was out of town, and I think out of town on a vacation with his family, that Mr. Hook got a message from Mr. Yagy's brother, David or Donald, to the effect that he should meet Mr. Lord at the Corfu Restaurant. Mr. Hook did meet him there, and Mr. Lord said he had the money for him, and he said he couldn't bring it down because it was bulky, he had to go to his house to get it, and he was driving Mr. Hook there, and Mr. Schwartz got in the car also, and they rode out to some remote point where there was a stabbing of Mr. Hook by Mr. Schwartz and Mr. Lord with an ice pick, which apparently was designed to bring about Mr. Hook's demise but did not. Now, as I say, that is for the record so that on appeal, or otherwise, everybody knows what the other events are that are supposedly dancing in the wings.

MR. KREMER: One last item, your Honor. I was advised by my client's mother that there was a possible source of jury contamination by virtue of the fact allegedly an individual by the name of Salvatore J. Panzarella, a Monroe County assistant public defender, had transported one of the jurors to the courtroom, and Mrs.

Lord has indicated that there is some prior animosity between Mr. Panzarella and the Lord family, and Mrs. Lord feels concerned that this juror may be contaminated by possible prejudice emanating from Mr. Panzarella. I would ask at this time that the Court voir dire the specific juror to see if, in fact, this situation did take place.

THE COURT: No, I will deny that because I view the contamination influence to be very remote in those circumstances, and without any greater showing, I will decline to interrogate the juror.

MR. KREMER: My exception to the Court's ruling, your Honor.

THE COURT: All right. Now, I have already advised Mr. Houlihan as to what I am doing as far as his requests to charge, and this came about through a chance meeting of Mr. Houlihan and myself this morning while I was having breakfast in the coffee shop in the Americana, and Mr. Houlihan came in seeking a cup of coffee, which turned into two cups, and I was looking through his requests to charge and I told him what I was going to do, he had his two cups of coffee and left, and that was it. He had not numbered his pages or requests. The first request of his I am not going to give. The second one, which talks about presumption of continuation of a conspiracy, would be given but not in that form, it comes out more to the effect that once a conspiracy is shown to have been established for a particular purpose, it would be considered or presumed to continue until that purpose had been accomplished or it was shown otherwise that the conspiracy terminated, and each conspirator member of a conspiracy would be presumed to continue as a member until such time -- by that I mean the time of accomplishing the purpose or the time of some other showing of termination of the conspiracy -- or such other time as there was a showing that the membership of a particular conspirator member had stopped. The third request I am giving. His fourth request, three paragraphs, starting out with existence of a criminal conspiracy, the first two paragraphs are all right, the third paragraph there I am not going to give. We have a photostat of Section 1102, that is satisfactory. 1103 is satisfactory. 1118 I am not going to give. 1119 I am not going to give. 1120 I will give in substance. 2905 I will give, 2906 I will give --

MR. COLICCHIO: I'm sorry?

THE COURT: 2905, 2906 and 2908 will be given. Mr. Morehouse -- these are handwritten so I do not have copies of it -- I will give number one, this will be in substance. He said, "If you find Ronald Hook was a willing participating principal in the purported robbery, you must regard his testimony with great scrutiny and with great care." The second one I will not give, essentially the missing witness charge, "If you find that a party under obligation to produce a witness to a material fact fails to produce such witness, you may infer that the testimony of said witness would be unfavorable to the party who failed to produce said witness." Three I am not giving because, although what he says is true, my charge will be as to reasonable doubt. The request is, "If you find after your deliberation that the scales of justice are equally balanced, you must acquit the party whose evidence you are weighing." As I say, I will charge as to reasonable doubt, and under the reasonable doubt charge it would be true that if there were an equal balancing, obviously there would not be a showing beyond a reasonable doubt, and there would be an acquittal. Four, he asked, "To convict under Subsection (d) it must be proven that the gun used in the bank robbery was loaded and specifically pointed at a certain person." I am not giving that completely that way. You will find that I will be stating that if a gun used in the robbery was operable, that is sufficient, and a brandishing or flourishing of the weapon in a threatening or about to be used way, something short of a specific pointing at an individual, would suffice. Now, Mr. Yagy's requests --

MR. MOREHOUSE: I respectfully except to the failure to charge.

THE COURT: Sure. You will have an opportunity to do that after I have given the charge. Mr. Colicchio, you referred to 2113(f), and you refer to a bank and Federal Deposit Insurance Corporation. I consider that 2113(g) is controlling in this situation as to a savings and loan association, and it is the Federal Savings & Loan Insurance

Corporation, of course, not a bank but a savings and loan association. Let's see, otherwise I think we are all right. We get to Page 3 where you are talking about the elements in 2113(b), and it is not pertinent, as far as Mr. Yagy is concerned, but you did say at one point, "The jury must find that the firearm, if any used, was an operable firearm and, if so, the jury may infer it was loaded." That is true, but also the reverse of it is true, that the jury would find that if a gun was loaded there is such presumption of operability. You are not concerned with it. The only other thing, on Page 4, this is part of your aider and abettor request, it says, "You are further charged that if you find that the defendant Yagy helped dispose of the money or monies taken from a robbery, if any, then you are charged that that participation came in too late to be an aider and abettor, rather he would then be what is known as an accessory after the fact." I find nothing in the evidence relating to that, so I would not give it. There is no indication of anything being done by Mr. Yagy --

MR. COLICCHIO: I believe Mr. Hook somewhere along the line, either in one of the reports we have received or he stated on the stand, that monies were given to Mr. Yagy after the robbery.

THE COURT: Well, that came in as part of that post robbery partnership gambling, where he was indicating that Mr. Yagy was trying to convert this pile of one dollar bills into something that would be, I suppose, easily pocketable.

MR. COLICCHIO: It was used at a point where Mr. Yagy had nothing to do with the planning, the pre-robbery planning or the robbery itself, that if the jury found that he in fact --

THE COURT: In the record as it now is there is nothing showing anything of this nature being done by Mr. Yagy, so it would go out.

MR. COLICCHIO: Very good, sir.

THE COURT: And the next paragraph I am not giving because I have taken that 2113(d) out of the case, as far as Mr. Yagy is concerned. You get to the point where you are talking of testimony of an informer and accomplice, and I will be referring to Mr. Hook as an accomplice, and dealing with his testimony as the testimony of an accomplice. I am not going to use the word "informer."

Obviously, what you want to do on your argument is up to you. There is a reference here further, I think, as I get into Mr. Kremer's requests, about providing evidence for pay, and again we have nothing in the case showing any payment made to Mr. Hook, so that would go out. Otherwise yours are all right, Mr. Colicchio.

MR. COLICCHIO: Thank you.

THE COURT: Mr. Kremer's is basically all right. On Page 2 he said, "I will charge you now that the guilt or innocence of defendant Lord depends solely and exclusively upon the evidence and the inferences that may be drawn therefrom that pertains to him and to him alone," and so forth. Basically that is true, except if the jury is found that a conspiracy came into existence and that Lord was a member of it, then in those circumstances acts other than his could bear upon it. Except for that, it is all right. Page 3, again, where you talk about banks, it will be savings and loan association, the Federal Deposit Insurance Corporation will be Federal Savings & Loan Insurance Corporation. Page 7, near the bottom, you say, "Although there is no direct or eyewitness testimony that the guns brought into the bank were loaded," will go out. The jury may well find that there was evidence that the shotgun was loaded. So I won't be telling them flatly that there isn't any such. Thirteen going into fourteen, talking about conspiracy, "Accordingly with respect to defendant Lord, neither the words nor the acts of either Schwartz or Yagy are chargeable to Lord unless and until you are satisfied that a conspiracy exists," and I would add there, of course, and also that Lord and the speaker or actor were also members at that time. It goes on a little bit from what you have. The second full paragraph, you are talking about, "The Government has charged that the conspiracy began around the first week of April 1976 and ended at a blank." The claim was it ended July 29, 1976, but I will be telling the jury flatly that there is no evidence of any continuation of the conspiracy beyond April 9, 1976. Page 23, well, there's the two references to pay, which I have taken out, of Hook, and calling him an accomplice other than an informer. Otherwise it is all right.

MR. HOULIHAN: Your Honor, you mentioned that you are not going to charge the concealment part of my requests, does that include the change of appearance?

THE COURT: Yes. There has been a request for flight and concealment, and if I give that, I would put in language that had to do with one changing his appearance, which is a type of concealment but, as I told Mr. Houlihan, I view that as being too remote in time from the robbery, which is what we are here dealing with, and quite obviously by what I put on the record as to other events, there is perhaps a greater implication that flight and concealment occurred because of the Wegman robbery, rather than because of this. All right.

MR. COLICCHIO: Your Honor, if I may be heard a moment? With respect to our motion on behalf of the defendant Yagy for a mistrial, I renew the motion on the additional -- on the same grounds as before and, in addition, based upon the proof in this case, based upon the various reports that have been before the Court and counsel in the course of the trial, and based upon the statements made by your Honor this morning regarding your review of the various documents submitted to you by the District Attorney's Office and Sheriff's Office and other police agencies, it is apparent, more than apparent that any attempt to link up the stabbing incident to the bank was on most tenuous grounds, which was known or should have been known to the United States Attorney before he started this case, and defendant Yagy takes the position that knowing it was on most tenuous grounds, and starting off in the voir dire mentioning the stabbing, and on the opening statement again mentioning the stabbing, had the effect -- would have the effect on the jury to know that this lad here had some unfortunate incident --

THE COURT: Well --

MR. COLICCHIO: -- whether or not it was connected to Yagy or not --

THE COURT: I see the line of thought, and so forth, but what I should say further or more particularly is that, already intargral in what I have said as to the other events, is that seemingly Mr. Lord did not participate in or have any risk of punishment or prosecution for the robbery of the Wegman's Supermarket, although again this is all -- you know, this isn't proof or anything, this is just what I seem to see in the wings, as I say. Nevertheless, in spite of not having any risk of apprehension or punishment on account of the Wegman's Supermarket job, Mr. Lord did actively participate in the stabbing of Ronald Hook, and the Government quite logically then says Mr. Lord's only concern and the only purpose in doing that, if he did, was to make sure that Hook did not come forward and testify or tell anyone about Mr. Lord's participation in the bank robbery. Consequently, I don't view the Government as having acted in bad faith.

MR. COLICCHIO: Your Honor --

THE COURT: You know, from the outset, Mr. Houlihan was striving to be able to prove in this case the happening of the Wegman's robbery, which I have excluded completely, and he had high hopes, until Mr. Hook's conversation about his getting out of town had nothing to do with the bank robbery, that the stabbing could be brought into the case, which it has not been.

MR. COLICCHIO: Your Honor, also this morning it was brought

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to your attention, I believe, in the one addition of the Democrat Chronicle of the events in this case, and in the article -- somewhere in the article and at the end of the article again the reporter referred to Mr. Hook being under the Federal Witness Protection Program, and that he had been stabbed forty seven times --

THE COURT: Well --

MR. COLICCHIO: -- words or substance of what was in yesterday's paper.

THE COURT: This happened in the final paragraph of a rather brief article that Nancy Crysler had in the Times Union last evening, where it ended up saying Hook was in the Federal Protection Program after being stabbed forty seven times with an ice pick, and at the end of Sheridan [illegible] story in today's Democrat Chronicle, again it ends up with the same remark. The jury had been strenuously admonished not to involve itself in any way with the media. I share your misgivings as to whether or not they in fact do follow those instructions, but I can only surmise they do, failing some other showing. They on voir dire and otherwise were told, after Mr. Houlihan had made a reference to the stabbing, they were asked, 'If you knew nothing more about the stabbing in the case, would you be able to set it aside, as you have indicated?' Two or three said no and went off the jury, and the others said all right and again, you may have some misgivings, as attorneys, as to whether in fact that is true, but I go along with the fact it is true.

MR. COLICCHIO: Your Honor, on behalf of the defendant Yagy, we move pursuant to Rule 29 for a judgment of acquittal.

THE COURT: That is denied. There was a question of jurisdiction, which I have not plowed through yet, frankly, which you have raised as to whether or not there was jurisdiction in this court because of the fact that the Columbia Savings Bank and Loan Association is not a federal savings and loan association.

MR. KREMER: The defendant Lord will withdraw its motion pursuant to Section 29 on that ground, your Honor, and will instead move for a directed verdict of acquittal pursuant to Rule 29 on all of the other grounds.

THE COURT: All of the other grounds?

MR. KREMER: Yes.

THE COURT: You are withdrawing the question of jurisdiction?

MR. KREMER: Yes.

MR. COLICCHIO: On behalf of the defendant Yagy also.

THE COURT: Jurisdiction is something that is fundamental, and would have to be faced, and my decision on that if there be any question, and of course, only if there would be a conviction or convictions in the case, and we don't know as to that, would be to face a jurisdictional question on a motion after conviction, if there be any such area. I will deny your motion.

MR. MOREHOUSE: May the record reflect that the defendant Schwartz joins with Mr. Colicchio's motions pertaining to this morning's newspaper article?

THE COURT: Yes, the same ruling.

MR. KREMER: The same for defendant Lord, your Honor.

THE COURT: The same ruling.

MR. COLICCHIO: Your Honor, on behalf of the defendant Yagy, one more, the defendant Yagy renews our motion for a severance.

THE COURT: You are resilient on these Saturday mornings.

MR. COLICCHIO: Well, if I am going to have to work all week -- we renew the motion for a severance, as we have made on several occasions.

THE COURT: I will deny that. Bring in the jury.

(Thereupon the jury entered the courtroom at 9:47 A.M.)

THE COURT: All right. We now enter upon the final three phases of the trial, the first of which is the closing arguments or summations by the attorneys. Mr. Houlihan will speak initially, and then each of the attorneys for the three defendants will speak, and each will be reminding you of the testimony and evidence that has been given, and will be contending to you how you ought to interpret that evidence, and then, of course, arguing to you whether there has been proof beyond a reasonable doubt as to the various crimes or whether there has not been. Now, while the attorneys are going to be dealing very expressly with evidence in the case, again I must remind you that nothing that the attorneys themselves say is evidence. As they talk about the evidence, think back to what the witness has said and what the documents say, and just make sure that you are not picking up something addition from what the attorneys say because that is not evidence. I urge you, however, to pay close attention to what they say, to their arguments, to their theories. Following that I will give you the instructions on the law, which will be the second next final phase, and then finally of course, you will deliberate and decide the case. All right, Mr. Houlihan.

MR. HOULIHAN: May it please the Court, counsel, ladies and gentlemen of the jury: The evidence in the case shows beyond a reasonable doubt that the defendants did commit the crimes charged. The burden of proof in this case, as the judge will charge you, is on the Government, always on the Government, guaranteed by the constitution. The Government welcomes that burden. The proof beyond a reasonable doubt is a heavy burden, and I suggest to you that if you examine the evidence carefully that you will find that the Government has sustained that burden.

We have the testimony of a lot of witnesses here. I am sure that in watching that you have paid attention to the evidence, you have heard everything that I heard, and your recollection is very good, but obviously I worked with the evidence and I would like to point up some things that I think are important. There is testimony, first of all, from the tellers that go to establish certain basic elements that the Government must prove in connection with the charges. The fact, first, that the bank was insured by the Federal Savings & Loan Insurance Corporation. We have that in evidence, the certificate of insurance, Government's Exhibit 1. I don't think there is a serious question concerning that.

The question was money taken, you have the testimony of Joan Bauer, saying that after an audit that some $43,365 was taken from the bank. She testified further that during the bank robbery money was taken out of the cash drawers belonging to the bank behind the teller cages. The question of whether this money belonged to and was inthe care, custody, control and management of the bank I think can be easily inferred from that evidence. The evidence further that certain bait money was taken, and she described to you how the bait money is attached to a clip, and when that clip is taken from the drawer that the cameras start working. You will recall the testimony of Clinton VanZant, who said yes, he had seen the film, he had taken the film, it had been processed, and there were some photographs of the bank robbers as they were leaving the bank. You recall there was the testimony of Mrs. Bauer, Betsy Meisch and of Sandra Power Ruthvin, who testified that there were threats made to them, that the sawed off shotgun was pointed in the direction of Betsy Meisch, she was told to get on the floor, in effect, get under the desk, that everyone in response to the demand for getting down, and seeing the guns, did get down. Whether the money was taken by force or violence or by intimidation, the Judge will charge what that actually means. I think the inference is that if someone comes into the bank and they show you guns and say get down or you are going to be killed, that certainly these people were intimidated. Certainly these people were in fear, and the question obviously is an objective one, we are not talking about timid people, but did something happen that made them fear for their lives when it really didn't make any difference, they really had nothing to fear? It is an objective test, certainly you can see that. Ask yourselves in determining whether if someone came in with a shotgun and pointed it at you and screamed at people in the bank that they must get down or be killed, whether there is sufficient evidence that there was force and violence and intimidation.

There are other aspects, obviously. Count 2 of the indictment charges they were put in jeopardy, their lives were put in jeopardy by the weapons. Well, the question first is what do guns do? They shoot. If someone didn't get down or something happened that provoked the bank robbers in the bank, would there be a possibility, were their lives in jeopardy, and I think that the conclusion of that is usually arrived at. The question of whether the guns were operable, obviously you saw no guns here, the question is can you make an inference from what evidence you do have that the guns were operable? I think we have some evidence of that. We have, first of all, the evidence of Dennis Wakefield, who testified that a week prior that he saw a shotgun, he saw some bullets. Obviously, bullets are different from shotgun shells. Then we have also some evidence from Ronnie Hook, who testified that after they had changed their clothes he saw Mr. Schwartz put two shotgun shells into the chambers of the sawed off shotgun. Certainly you don't put shotgun shells in a gun that doesn't work. That is the inference that the Government asks you to make as to whether the shotgun was operable, whether their lives were placed in jeopardy.

We have some other evidence that I think is very pertinent from the tellers, not only the actual threat but the descriptions of the particular bank robbers. The one with the shotgun was described as stocky, that he was about five ten or five eleven. The other is described as stocky, approximately six feet, by one witness; five foot eight, two hundred pounds, stocky, by Mrs. Tatelbaum. They moved very deliberately in the bank. I suggest to you that these descriptions become very important in considering the testimony here. The principal question that remains in this case is who did it, and what proof do we have of who did it?

First of all, Count 3 of the indictment, as the Judge will charge you, specifically charges a conspiracy. This in essence says that it is a crime to just agree to do something, just to agree to do it, if you make some overt act in furtherance of this agreement. Whether or not it is successful at all is of no consequence to that particular charge. A mere agreement and an overt act in pursuit of that agreement, an illegal agreement, is sufficient to establish that charge. Obviously, you have to consider all of the facts to see if it was proved beyond a reasonable doubt. The overt acts that you will see charged in the indictment, and I am sure the Judge will give to you for your deliberations the charge on overt acts, and the overt acts you will find do not have to be criminal overt acts, they can be very innocent. If you plan on robbing a bank and then you drive your car toward the bank in order to effect the bank robbery, even if you never go into the bank, the mere fact you are driving your car, which, of course, is perfectly legal assuming you have a license, is an overt act in furtherance of that agreement.

Well, in this indictment you will find there are four overt acts charged. It is charged that on or about April 9th Lord and Schwartz met with Hook and drove a 1972 Buick to the Columbia Savings & Loan Association. Mr. Hook testified to that. On or about April 9th Gerhard Schwartz and James Lord entered the Columbia Banking Savings & Loan Association. Mr. Hook testified to that. On or about April 9, 1976, certain money was taken from the bank, it was placed in a 1975 blue Chevrolet Nova. You recall that Hook testified that the money was taken, they switched cars, and then they went into the Nova, which was driven by James Lord. Then the fourth overt act, on or about April 9th, Gerhard Schwartz, James Lord, Ronald Hook and Gerald Nagy met with each other at 65 Britton Road. You will recall there was testimony from Hook about that meeting, and we know now that the purpose of that meeting was to divvy up the money that was taken in the bank robbery.

The charge of armed bank robbery is the second count of the indictment, and that charge is that while in the course of the commission of the robbery dangerous weapons were used, and that during that robbery the lives of certain people were placed in jeopardy. I told you about that jeopardy, I have argued that to you. Certainly there has to be proof of knowledge, prior knowledge that the gun was going to be used. Certainly, if you believe the evidence, Mr. Schwartz knew that a gun was going to be used because he was brandishing it when he went into the bank. Certainly Mr. Lord knew that a gun was going to be used because he certainly brandished it when he was in the bank. Certainly there is no proof here that Gerald Yagy knew about a gun being used prior to the bank robbery, and therefore you don't have that for consideration in the case. There is some evidence that he knew afterward as the gun was being handed to him by Lord at his house. You don't have that to consider when you deliberate on that charge.

Count 1 of the indictment charges the bank robbery. All three defendants are under consideration in this particular count, and I told you in my opening statement that the Government made no claim that Gerald Yagy actually went into the bank on April 9th. We do claim that James Lord and Gerhard Schwartz did go into the ban . The Government has charged that the three of them entered the bank because of the aider and abettor statute, the Judge will tell you what aiding and abetting is. In essence, if someone joins in a criminal venture and aids and abets and counsels and procures the ultimate illegal act in some way, then even though that particular person did not perform every act, that he was participating. Even though in this case Mr. Yagy did not go into the bank physically, he could be charged as a principal because he aided and abetted and counselled and he knew the criminal venture. This is what I feel the proof has shown in that regard in that charge.

Now, the testimony of Ronald Hook is very, very important in this case, and I submit to you, ladies and gentlemen, that even though he has been referred to as an informant, that he is not an informant, he is definitely an accomplice, and Judge Elfvin, I am sure, will charge you that as an accomplice you are to scrutinize his testimony and look at it very carefully, and weigh it to determine if he has motive to lie. Just what was his involvement in this? I suggest to you that in weighing Mr. Hook's testimony carefully, and you ought to, that you look at the factors that ought to be considered. Does he have a motive to lie? Obviously, Mr. Kremer elicited from him that I made a promise to him that he would not be prosecuted for these federal crimes. I wonder if the Government has really given up anything or very much by not prosecuting a seventeen year old boy under these circumstances. I wonder if you would conclude that that was an improper judgment or whether he was influenced in any way in his testimony, and there is no use pretending, obviously he was subjected to cross examination, there are some inconsistencies pointed up by defense counsel, and certain of these things are instances that you have to take into consideration. I suggest to you that when you look at the testimony of Ronald Hook, remember this is a seventeen year old boy who's trying to recall the events that took place sometime ago, and at the time he was involved in those he did not ever realize that he would be asked to testify as to those. This is distinguished from an investigator or trained investigator who obviously knows during the course of his conversations with subjects or witnesses that someday may be called on to testify, who is going to take notes of what he remembers. The question really is were there inconsistencies? Yes. Were they material inconsistencies, were they things that really go to the heart of his testimony? If so, were they sufficient to say that we dare not believe Ronald Hook? I suggest to you, ladies and gentlemen, that in evaluating Ronald Hook's testimony that you may use your own common sense, that is why we have juries, because they collectively have the wisdom of millions, that you evaluate the testimony of Ronald Hook, and that you evaluate what his testimony shows, and Judge Elfvin will describe to you that his testimony is direct testimony, eyewitness testimony, he was there, he saw and he told you about it. There are certain portions of this evidence that is circumstantial evidence, and don't be fooled by what you hear on the

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television, 'Oh, this is only circumstantial evidence.' The Judge will tell you that circumstantial evidence is very important, that it is received as equally as direct evidence, and certainly may be considered by you, and to explain to you what circumstantial evidence is, for example, if you went to bed at night and there was no snow on the ground and you woke up in the morning and there was snow on the ground, then you can infer very easily from those two facts that it had snowed during the night, even though you did not see it snow. I suggest to you that another example is that on the day of the bank robbery you know that Special Agent VanZant interviewed James Lord, and you recall that this was in the afternoon, and that Mr. Lord said he was at his mother's visiting for some three hour period in the morning between eight thirty and eleven, except for a ten minute period when he got a doughnut or something, and you recall that we have the testimony of Special Agent VanZant about a telephone call that was made I think you can look at that and wonder why a telephone call would be made like that, why not call up and say, 'Mom, there's going to be some people talking to you, don't worry about it, tell them what you know.' Why there had to be the explanation, 'They think I robbed a bank this morning and I told them that I couldn't, I was visiting with you all morning.' Why this lengthy explanation on the telephone call? But do we have to rely just on that particular part? No, we have the other side of it here, we've got Mrs. DeCastro who testified. You recall she was interviewed the day after, I think she said the day after or two days after the actual bank robbery. She said yes, she recalled, and she was there and in and out four or five times in the morning, gave a bath to Mrs. Lord, and there were no visitors there, the visitors hours didn't start until eleven. She said Mrs. Lord was post operative, she wasn't allowed any visitors before eleven, and you will recall in the afternoon she happened to be in the room and heard, 'Don't worry, Jimmy,' on the other end of the line. I suggest to you that these facts can lead to a conclusion in your mind about the consciousness of guilt of James

Lord. If you don't have anything to hide, if you didn't do anything, why is it necessary to make something up? You recall the cross examination of Mrs. DeCastro. 'Mrs. DeCastro, there were a lot of people around there in the morning, you don't really remember this?' She said 'Yes, I do remember it, as a matter of fact, this was the only day I worked there.' Ask yourselves if that isn't significant. She used to work on pediatrics and went up that day to work in this particular wing, and then the question about, 'Well, how many beds in the A Wing? Twenty six beds. And you worked in the B Wing, didn't you, and there were a lot of people, how many people did you take care of that day,' and she said, 'Four people.' Could she be mistaken, was there somebody there for three hours in the morning visiting with Mrs. Lord? I suggest to you that this is evidence that you can consider in determining the consciousness of guilt, circumstantial evidence, that is important.

Now, in weighing the testimony of any witness, that is your sole responsibility, you are to decide the facts, no one has any control over you as to how you construe the facts, no one can tell you what to do with it, in evaluating the testimony, and I speak specifically about Ronald Hook, obviously he is very important, you judge the credibility, and it is just like anything else, when you talk to somebody how do you judge whether you believe them or not? You look at them, how they say things, what they are saying, their eyes, the feelings that you get, all of these things are important, how they answer the questions, do they make things up or admit when they don't know, what is the likelihood of his remembering the events of the bank robbery, were there inconsistencies and, if there were, were they material, and in remarking about the inconsistencies, obviously Mr. Hook, a seventeen year old boy, subjected to cross examination, which obviously defense counsel have the right to do, and you saw that as well as I did. There was the suspension from high school, that was inconsistent with what Mr. Hook testified to, and Mr. Hook explained that he didn't know that he had been suspended. We don't know if that letter was sent out by the school, it wasn't mailed to Mr. Hook, it was addressed to his father, and even if it was, is that really material? It certainly hasn't a great amount of significance as being a participant in the bank robbery might be. He would remember the bank robbery a lot more than he would remember some suspension from high school. His grades, you recall he said he had average grades, certainly he said C's and D's. Mr. Kremer brings in his last year and says, 'Ha, ha, I got you, they were D's and E's or F's.' And Mr. Hook said, 'Well, there are C's.' He said, 'No, I'm referring to the final grades.' Where is the first year that Mr. Hook went to Greece Arcadia? Then there were prior statements that there was an attempt to impeach his testimony on, that his testimony before the grand jury was inconsistent with his testimony here. There was the question, "Was Mr. Yagy at home? Yes, yes he was." And then the questioning -- this was the grand jury testimony and then the questioning on the stand, I said, 'Was Mr. Yagy home? Yes, he was. Where was he? He was waiting for me at the corner when I got off the bus.' Is that an inconsistency or is it a matter that he was not asked a greater detailed question? Do you recall that he testified his testimony before the grand jury was some fifteen pages, and it took about five minutes. Do you know how long his testimony took in this courtroom. And I suggest to you that those are not inconsistencies, but that he was not asked the question. Mr. Colicchio brought up, 'Oh, now, you've got this report here from Agent VanZant where it says that you split the money up, you got the money and got your share at the Flagship.' Obviously, it was read to you, you remember it was a very general statement, it was made by Special Agent VanZant. We don't have any knowledge of what he asked Mr. Hook, there are no quotes around it which is very important so you know whether it was the exact words or not. Mr. Colicchio went through every one of those things saying Yagy did this, Yagy did that. I obviously asked the identical questions, 'Does it show that you were asked that question, does it show that you were asked that question?' I suggest to you, ladies and gentlemen, that if there is any inconsistencies in that testimony -- Mr. Hook testified after ward that a statement made prior to his grand jury testimony was in fact consistent with his testimony here in court, and that one was the twenty eight page statement that was given when a reporter was taking down questions and answers, when he was interviewed by Mr. Relin. There is some other impeachment of Mr. Hook, 'Mr. Hook, you had three days, did you not, in which to withdraw from this conspiracy? Yes. You didn't report this to the police? Well, no, no, I didn't.' I don't think that Mr. Hook ever said that he did. He said that he thought about withdrawing from the conspiracy, and I think that he should have withdrawn, and certainly he did participate, but remember when you are considering that, that you are considering a seventeen year old boy who had the wisdom of seventeen years, and I suggest to you that there is a forty one year old man hanging around with a seventeen year old boy who had three days in which to report this and didn't. You know what happened. Why are we saying, 'Okay, seventeen year old boy, have the wisdom of Job, and shouldn't you have withdrawn from that and reported it to the police?' Mr. Kremer said, 'Isn't it a fact that you really wanted the money?' He wanted the money and that obviously makes him a very eel person. Of course, he wanted the money. He didn't have a job anymore, he was delivering pizzas, and he had a debt. It was fun gambling, and as Mr. Hook testified, he was hoping for a million dollars, if you are going to rob a bank why not go all out? I suggest to you that that is pretty important. And what did he have to do? He would only have to drive a car for some eight seconds. And that honesty of Ronnie Hook, that certainly came in. Mr. Kremer asked him, 'Well, did you ever take money from your employer?' He said, 'Yes, I did. Did you tell him about it every time? No, no, I didn't. Well now, now many times did you take it, six or seven times? I guess I really don't know exactly, I don't know, six or seven times.' Well, you know, if he didn't tell him employer about it, then when his employer come in to testify he couldn't say, 'Ronnie told me about it, I know Ronnie took money six or seven times.' You recall the testimony of Mr. Hook, yes, he had taken money, but it was always there prior to opening the next day except the one time, and he told him about it, he said he would pay it back, and Mr. Columbo said, 'Yes, I recall that, he told me about it.' I asked on cross examination — it wasn't even my witness — I said, 'What do you think about Ronnie Hook, would you hire him again, was he honest? Yes, yes.' And then in a very dramatic moment Mr. Colicchio said, 'Do you know he testified this morning that he had taken money from your cash drawer six or seven times?' He said, 'No.' Maybe I should have gotten up and said something but I think about my question to him earlier, 'Did you ever lose any money as a result of Ronnie Hook? No. Did he always pay you back every bit of the money that he borrowed from you? Yes.' So is it that important? I wonder if you brought the employer in what he would have said. 'Did Hook take money from you without your permission how many times? Once.' If Hook had only said once, who would know better, but he didn't say that, he said, 'No, six or seven times I did it.' I think you can judge that in terms of deciding his credibility.

I think the introduction of Ronald Hook into this crime is classic, and it brings to mind the dispicable character created by Charles Dickens' of Fagin in Oliver Twist. You remember that Fagin was the man who taught children how to be thieves, and why children? Why because they are young and impressionable, they don't have the wisdom. We've got a kid who dropped out of high school, he had average grades -- maybe he had below average grades -- I don't think it makes any difference. At least he wasn't a A student who made the decision that he was not going to participate in a bank robbery, who may have made the decision, 'I'm not gambling with this forty one year old man.' You know, a seventeen year old boy, he can be molded to do those things that you want him to do, as they say, he could be cheated easily. You know, here was have a boy that is unskilled. He pumped gas when he quit school. He was working part time while he was in school pumping gas and when he quit his full time job was pumping gas. I'm not talking about somebody who is in business and can make all sorts of judgments, and this unskilled, unemployed person is all of a sudden told, 'You are going to make

$75,000 on your end alone.' My God, what a lot of money. Why? Why would a forty one year old man hang around with a seventeen year old boy? Why would he take a seventeen year old boy to a gambling hall where they are playing high stake games? Here's a kid who had twenty five and fifty cent games before. He liked to gamble, is that bad? Gambling when you can't afford it and what it drives you to are the problems. But why is a seventeen year old kid being brought to social clubs where there are high stake games? No, he doesn't get to gamble, 'You split half the winnings and half the losses with me, I will gamble.' And as you see, he incurs a debt. Mr. Hock testified that there was a debt, some four hundred, four hundred fifty dollars on his part, and jointly they owed nine hundred to a thousand dollars. Doesn't it really lead one to believe that here is a very, very vulnerable person? He was taken advantage of by someone who had forty one years of wisdom and should know better, and then says to him, this unemployed, unskilled, uneducated person, 'I've got a chance for you to make some money. What am I going to have to do? Rob a bank.' Hook says, 'It can't be done. Done all the time, no problem, don't worry about it, all you have to do is drive the getaway car.' I suggest to you, ladies and gentlemen, it is at least at this point that the conspiracy begins between Ronald Hook and Gerald Yagy. Now, did he know about the bank robbery prior to that time? Answer, obviously, if he didn't know about the bank robbery he wouldn't have been able to tell Hook. We don't know how long prior to the bank robbery he knew about it, but at least at that point he knew. He had to tell Hock what to do, 'Do you want to participate in a bank robbery, make a lot of money, only have to drive for eight seconds?' Do you recall that a couple of days later on a Wednesday night he was introduced to O'Brien, who he testified in court is the defendant Lord, and Jimmy O'Brien said, 'Hey, great, we're going to rob a bank, it's really easy, don't worry about it, no one is going to get hurt, you only drive a car for a short period of time, it might seem like an hour but it's only going to be a short time.' You recall he said, 'We tried it last week but the Wegman's store was robbed next door, we didn't go through with it,' and do you recall that Yagy was in the car at this time, 'We tried it last week and it didn't go down because of the Wegman's robbery, all the police were around there,' and he said, 'You know, this is really going to be the best day, this Friday, because they are going to be dropping off a lot of money,' and, as you know, there was a Wells Fargo truck out in front. Mrs. Tatelbaum testified that there was a Wells Fargo truck out there when she was walking in the bank in the morning. Then they go out, Yagy and Lord and Hook drive out to the Columbia Bank, and they go through the run, a dry run of what is going to happen, 'Pull into the plaza in front of a bank, you make a quick turn by the bushes, when you get by the bushes they can't see you, you have already lost them, you quick pull into the medical center parking lot and switch cars.' Then they try it again, 'Are you sure you've got it? Yes. Don't worry about it, it will be easy,' obviously the conspiracy had begun. We know now that Hook and Yagy talked a couple days before that. The third conspirator comes in, and may have always existed in the conspiracy and is continuing with the addition of Ronald Hook. We know that Lord and Yagy are in the car, they are going over the bank robbery, and then there's the conversation the next day where Mr. Yagy alone is saying, 'Don't worry about it, don't worry about it, it will be easy, and you will never get caught, and even if you do get caught they are not going to do anything to you,' and perhaps that is right as it turns out, because he is a seventeen year old boy, and that is a very interesting situation, but what is the Government giving up in giving this boy another shot, another chance at life, and think of the scars of his experience, participating in a bank robbery, think of that, and having to testify and be subjected to cross examination, think of how he will remember that, if that won't help him in the future, and I suggest that then the next day decide that conversation, that conversation on Thursday night, Yagy said, 'I'll pick you up at seven thirty in the morning.' On Friday morning he picks him up and brings him over to the Tiptop Restaurant, and he leads him over to Lord and Schwartz who are sitting there, and Yagy goes off someplace. I think that is important. If Ronnie Hook was out to get somebody, why not put Yagy at the same table, why not say, 'He was sitting there talking to us.' He didn't say that. He said, 'No, Yagy took off someplace and the three of us talked.' You recall that during the course of a conspiracy the conversations made by other conspirators in furtherance of the conspiracy can equally apply to other members of the conspiracy, namely, Yagy, and the conversation that took place at that table can be applied to Yagy. Then they go to another restaurant, killing time until the bank opens. There was a line of people, you will recall, at the bank, they had to wait a few minutes. All of a sudden they come in, and Mr. Hook described what they were wearing. I forgot, they went and changed first. They wore gloves so no fingerprints would be found, and all three of them had gloves, dark glasses that Ronald Hook had, and the stocking masks that Lord and

Schwartz had, and they go into the bank, and they are in there, and you know from the testimony of the tellers what happened. They leave, come out, get into the car and get away. They switch cars and, boom, they are off, and dispose of the gloves and the sneakers and the coveralls, and throw them in a dumpster, and then proceed to the Flagship or the Americana where they split up the money. Was there a plan? We can show there was a written agreement obviously, we don't have to prove something like that, just an agreement together to perform some unlawful act. Was it planned? They had gloves for everybody, for the three people, they had the coveralls and the stocking masks, they went into the bank, there was split second timing, they knew the Wells Fargo truck was going to be there with the delivery, and then after the bank robbery Hook gets nervous and apparently gets close to being sick and then leaves and goes over to Yagy's house to wait for them, and Yagy said, 'You stupid jerk, why did you leave the money?' Why would he be so interested in the money if he wasn't a participant in the bank robbery? Obviously he didn't participate, and at this point the bank robbery is over, he hadn't received his money, and they have to wait for two hours. I am sure you will recall the testimony that Hook told you about while they were waiting, and finally Lord and Schwartz show up, and they say, 'The kid did good, he got a little nervous afterwards, but he did okay.' Then they give Yagy $2,000. You know, one thing I think that has to be looked at is why would Yagy persuade this kid to drive the car? I mean presumably they had three people and why not Yagy drive the car and Lord and Schwartz go into the bank? I guess that is something that has to be answered and I suggest that perhaps if you look at Mr. Yagy that maybe he has got the features that he is afraid that people might recognize whether he has a mask or not. I suggest to you that, you know, what better thing than to suck a little seventeen year old boy into doing this and taking the risk for you and getting your $2,000 for making the connection, and then stealing another four from him for making his connection. What a great group this is, $43,000 taken from the bank, and they said there was only thirty five or thirty thousand dollars taken, and then they split it up presumably, with $2,000 for Yagy, and then presumably the three people split it up, and Hook ends up with $9,700. What a great group. Yagy saying, 'Well, don't tell them you are only seventeen, tell them you are twenty one.' I mean everybody is lying, lying to each other in that thing. What kind of people do that? The money is ultimately split and Yagy takes his $4,000 off the top from Hook, and for all intents and purposes this conspiracy is ended. April 9th, it is over with, they have accomplished what they wanted to do. They planned to rob the bank, it was a well planned bank robbery, they were only there a short time. As Mrs. Tatelbaum said, they moved deliberately in the bank, they come out, they escaped, they switched cars, they dispose of their disguises, they go and split up the spoils at Gerald Yagy's house, and it is over with.

Was there a motive for Yagy's participation? Yes, he had a debt, too. You remember he is the one that had credit. We know about his credit from Ronnie Hook, we know how much he owed in the partnership deal that he had with Hook gambling. We certainly know that the need is there, and the greed obviously is there. You can just imagine his eyes lighting up and saying, '$75,000 will be your part of the deal.' And you will recall that Mr. Lord certainly had a motive, too. He had been out of work for a number of months he advised Special Agent VanZant, so certainly he was in need of some money. The question then is did Yagy, in addition to the conspiracy, did he aid and abet and counsel and procure and enter the criminal venture to a sufficient extent for you to find him guilty beyond a reasonable doubt of Count 1 of this bank robbery. You know what he did. He said, 'Ronnie, go to this bank and rob it, all you have to do is drive the car.' What did he want to bring about, what criminal venture? A bank robbery. What did he try to bring about? A bank robbery. Did he counsel? 'Don't worry, Ronnie, it will be fine, it will only take eight seconds.' Did he counsel further? 'Let's make a dry run.' Does he have to perform each act, does he have to go into the bank, no. The judge will charge you on that. The testimony of Ronnie Hook -- I could go into more detail, but obviously you have heard it all. I don't want to tell you what I heard because it is what you heard that really counts -- but is that all? The Judge will charge you that he is an accomplice and, yes, you've got to scrutinize his testimony, but if you believe Ronnie Hook and his testimony beyond a reasonable doubt, then you don't need anything else, that is all you need. If you believe him, you can make a finding. But are you stuck with that? No, you are not, you have other evidence in the case. Certainly you can consider circumstantial evidence. You have the testimony of Mr. Dennis Wakefield, who testified here and said that the week prior to the actual bank robbery, April 1st or 2nd, around that time, that Schwartz, who he has known for a long time, and some guy named Jimmy came to his home, they were dressed in overalls, and Schwartz had a shotgun, interestingly enough, and they said, 'We were going to rob a bank today and we didn't because we heard the Wegman's store next door was robbed, so we didn't do it.' Why they would go over that, I have no idea. I mean that may be some macho thing, 'I'm a big man, look what I can do,' or what it is I really don't know. In any event, this is just a poor guy that happened to be friends with Gerhard Schwartz, and he comes forward and testifies here in court and tells you what he knows, and he identified Mr. Schwartz in court, he identified Jimmy. He said, 'You know, I can't be sure,' and you recall the cross examination by Mr. Kremer, 'You can't be sure, there is nothing unusual about that day or anything like that, was there? Obviously you are not sure now, you are not sure then.' You can consider that. Certainly the identification was adequate. Certainly you picked him out of a courtroom, he looked around, they happened to be sitting over here at the defendants' table, there were three people at the table, and he was one of them. Well, you can argue that, whether that identification is sufficient, and was it truthful? My God, was there anything shown that it wasn't truthful? He was there, they cross examined him, his identification of Lord wasn't positive, but do we have anything else? Yes, we do. Does it corroborate anything? Yes, it corroborates Hook. Why? Because when they were going to do the dry run Lord says to him, 'We were going to do it last week but because of the Wegman's robbery we didn't do it.' So here we have a person that comes in and testifies yes, that is what happened. Lord, who you remember was introduced to Ronnie as Jimmy O'Brien, Lord says the same thing. Isn't it the same person? I think the inference can be made. Do we have anything else? Yes, we have the testimony of the physicians that Schwartz was physically able to do the bank robbery that day and, in fact, there was testimony about the prescription for pain pills, if he was in pain he could have taken the pain pills and then gone and robbed the bank. Is there any other circumstantial evidence? Yes, I talked about this before, there was the statement by Lord that he was visiting his mother on that day, and you heard the testimony of Mrs. DeCastro, and you know

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how she remembered that. Ask yourselves how many times does an FBI agent come to you the next day and say what happened yesterday? You are going to remember when they talk to you, and ask yourselves why he would make this kind of a statement, and also one other thing, you recall that this was shortly after the bank robbery, the bank robbery was at nine ten in the morning and the interview with Mr. Lord was about three o'clock, and at that time a man, who had been unemployed for a number of months, by his own admission, had $1,300 in his wallet. Oh, there was no bait money there, but $1,300 shortly after the bank robbery. Doesn't this say something? And you have other things, ladies and gentlemen. You have the confession of Schwartz, the confession telling his involvement in the bank robbery, the confession that I suggest to you coincide in numerous ways to Ronald Hook's testimony regarding Mr. Schwartz's involvement in this bank robbery. You recall this statement wasn't made until November 22nd, and Hook's statements were made earlier than that, and I think that is pretty interesting. And that is not all you have. I suggest you have one other thing that I think you can use and look at, and that is Exhibits 3 and 4, the photographs, one group. You recall we had Mrs. Tatelbaum testify, she is the one shown lying down on her knees in the back. We have, first of all, the bank robber going out wearing the coveralls, and as he approaches the door exiting the bank, look at the build of that individual, and compare that, I suggest to you, to the build of the individual seated over there, Gerhard Schwartz, and then look, ladies and gentlemen, at the second group, Government's Exhibit 4, which is the second individual. Remember the one with the shotgun was Schwartz, the one with the handgun, according to Hook, was Mr. Lord. Look at that, and look at the build as he approaches the front door, you are starting to get a closer look at him, and I suggest to you that you get even a closer look at the stocking mask over the head, and I suggest to you if you look in the stocking mask you will see a hairline under that, look at that hairline, and look at Mr. Lord's hairline, and ask yourselves if that isn't some evidence that you can consider in this case.

Ladies and gentlemen, I suggest to you that based upon all of the evidence in the case that you can conclude that the defendants are guilty of the crimes charged beyond a reasonable doubt. Thank you.

THE COURT: Mr. Kremer?

MR. KREMER: Judge Elfvin, Mr. Houlihan, ladies and gentlemen of the jury: I would like to thank you first on behalf of the defendant, James Russell Lord, Jr., for your close attention upon the various matters that have been presented to you. It is a very important case to the United States of America, it is a very important case to James Russell Lord, Jr. There has been a lot of pressure to get the testimony in, and the court hours have been extended to Saturday. We are most appreciative that you have taken this time from your lives to do a civil duty. The jury system is an ancient one, we have been having jury trials beginning in medieval England in the fourteenth century, and for the better part of six or seven hundred years citizens such as yourselves have had a chance to sit and deliberate on the

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PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 1:10 P.M.

(Defendants present, counsel present, jury present.)

CHARGE OF THE COURT

THE COURT: Now, ladies and gentlemen, first of all, Mr. Houlihan had requested an opportunity to make what we call a little rebuttal argument, and I denied him that right, it is sort of a discretionary area with me as to whether something has come up which would surprise him. One thing that was said by Mr. Morehouse was that you had been denied the right to look at a movie. There was testimony by a couple of tellers and I think Mrs. Tatelbaum that they had witnessed a film. I haven't seen the film. Of course, it came in identified as Government's Exhibit 2. Mr. Houlihan at one point wanted to set up a camera and run it, and I decided that with Government's Exhibits 3 and 4, which were the nine photographs of what was going on in the bank, and the testimony of the tellers, that really was redundant, something we did not need to see. That is not deciding the facts for you, but just that we couldn't run on and on and on. There was a movie, and it is not Mr. Houlihan's fault that it was not produced, and I will leave that with you.

Now, at this time I am going to tell you what the principles of law are which will govern your deliberations, and it probably will be that as I go through you will find some segments of it that you won't immediately be able to bring to bear upon the case, and later, as you talk and deliberate, I think you will, but there still may be some fuzzy or ambiguous areas and, as I will tell you at the conclusion of the charge, that any such thing as to which you need clarification, rereading or regiving of instructions or of listening to all or part of somebody's testimony, why you send a note to me, we take it up and do it, and so subject to that, we will go forward.

You have been told by everybody, including me, that your job in this case is to decide the factual issues. As far as deciding the facts, no one other than you is going to decide them. I have made a couple decisions -- well, one mainly -- as a matter of law, when I said as to Count 2 and Mr. Yagy that there just was not enough evidence in the case that I could permit a jury to make any finding that he could be guilty of that count. Short of that, and except for some situation like that, that is the only one there is -- there is one more and I will get to it later -- all the factual determinations are yours, not the attorneys, they are not mine. If I do make reference to some fact and it varies at all from what you remember, yours is the recollection that controls and not mine. Yours will be the decision. I have made some rulings on objections or motions from time to time during the trial, and I ask you, I instruct you rather, not to read into any of those decisions, whether I sustained an objection or overruled an objection, or did this, that or the other thing, don't read into it any idea that I have some conviction one way or the other on any of the factual issues, including the guilt or innocence of any of these defendants, and even if you should think I do, please ignore it because that is your job, not mine.

Now, the Government claims that defendants here participated in a scheme to commit a larceny of the Columbia Savings & Loan Association in Rochester, and this is alleged to be insured by the Federal Savings & Loan Insurance Corporation, and you have had some proof on that, and that will be one of your determinations, as to whether in fact it is, but it is alleged that the defendants committed a larceny there in that savings and loan association. The indictment, as you will see, and the indictment will come to you in the jury room, charges actually two categories of crime, and I alluded to this earlier. The first two counts, Count 1 and Count 2 are what we call substantive crimes, where the allegations are in Count 1 that each of the three men antered the institution with the intent of stealing and purloining money, and so forth, and Count 2 is similar, that they actually were doing something of a substantive nature. Count 3 alleges a crime of conspiracy, and that is a different nature of crime. The basic difference is that with a conspiracy it is the plan or conspiracy to actually do the particular illegal acts which is criminal, it is not the actual doing of the acts themselves. So when I speak of a substantive crime, I am talking about the actual doing of a particular criminal act, and when I speak of a conspiracy, I speak of the planning or the conspiring between or among two or more persons to do an illegal act, and the rules applicable to the two types of crimes are quite different. For simplification, consequently, I will go ahead with Counts 1 and 2, which deal with the substantive counts, and put on the side burner for the moment Count 3 which charges conspiracy.

Count 1, I will read it to you, again you will have it there before you, it says: "On or about April 9, 1976, in the Western District of New York -- and I will advise you that the Western District of New York comprises seventeen counties, those seventeen counties which lie in the western end of New York State, and include Monroe County -- on or about April 9, 1976, in the Western District of New York, James R. Lord, Jr., Gerhard J. Schwartz, and Gerald J. Yagy did enter the Columbia Banking Savings & Loan Association, Rochester, New

York, the deposits of which were then insured by the Federal Deposit Savings & Loan Insurance Corporation, with intent to commit in such bank a felony affecting such bank, that is, the taking by force and violence and by intimidation and from the presence of employees of such bank, money belonging to and in the care, custody, control and management and possession of the bank, all in violation of Title 18, United States Code, Section 2113(a)."

Title 18 is the Criminal Code of the United States, and that particular section, as far as it is pertinent, says, "Whoever by force and violence or by intimidation takes from the person or presence of another any money belonging to or in the care, custody, control, management or possession of any savings and loan association is guilty of an offense against the United States."

All crimes that we deal with in trials like this are made up of elements, each of which has to be proved by the Government, and as to the crime represented in Section 2113(a), there are three essential elements, each of which must be proved beyond a reasonable doubt, and that phrase "beyond a reasonable doubt" is something I'm going to be using from time to time, and later on in these instructions I will define it for you, the three elements, each must be proved beyond a reasonable doubt to establish the offense charged in Count 1 of the indictment, first, that the money taken belonged to or was in the care, custody, control, management or possession of a savings and loan association whose deposits were insured by the Federal Savings & Loan Insurance Corporation; and secondly, that the act or acts of taking such money from the person or presence of another was by force and violence or by intimidation, and third, that such acts were done willfully.

The term "savings and loan association" as it is used in Section 2113(a) and also in 2113(b), which I will get to when I talk about Count 2, means a savings and loan association, the deposits of which are insured by the Federal Savings & Loan Insurance Corporation.

Now, if you should find beyond a reasonable doubt from the evidence in the case that at the time and place of the alleged offense, the Columbia Banking Savings & Loan Association, either alone or jointly with others, had actual or constructive possession of the money described in the indictment, then you may find that such money was in the possession of the association, within the meaning of the word "possession" as used in these instructions and in the statute.

The law recognizes two kinds of possession, actual possession and constructive possession, and a person -- I will tell you in this regard that a savings and loan association is a person -- a person who knowingly has direct physical control over a thing at a given time is said to be in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion and control over a thing, either directly or through another person or persons, is said to be in constructive possession of it. The law recognizes also that possession can be sole, in other words, by one's self, or joint. If one person alone has actual or constructive possession, possession is sole. If two or more persons have that possession, then it is joint.

Now, you know, I said that the acts charged must have been done willfully, and I gave that to you as the third element of this particular crime. I tell you that an act is done willfully if it is done voluntarily and purposely, and with the specific intent to do that which the law forbids, namely, with the purpose either to disobey or disregard the law. To take or attempt to take by intimidation, which also is used in the statute and in the count of the indictment, means willfully to take or attempt to take by putting in fear of bodily harm, and this must arise from the willful conduct of whoever is accused of doing it, rather than from the mere temperamental timidity of the victim or of some person involved. However, the victim's fear need not be so great as to result in hysteria or panic or terror. A taking or attempted taking by intimidation must be established by proof of one or more acts or statements by the person accused which were done or made in such a manner and under such circumstances as would produce in the ordinary person fear of bodily harm. However, actual fear need not be proved. Fear, like intent, may be inferred from statements made and acts done by the accused and by the victim as well, and from all of these surrounding circumstances shown by the evidence in the case.

I come down to Count 2 of the indictment, and that reads, "On or about April 9, 1976, in the Western District of New York, James R. Lord, Jr., Gerhard J. Schwartz and Gerald J. Yagy, by force and violence and by intimidation, did take from the personand presence of an employee of the Columbia Banking Savings & Loan Association, Rochester, New York, approximately $43,365 in money belonging to and in the care, custody, control, management and possession of the Columbia Banking Savings & Loan Association, Rochester, New York, the deposits of which were then insured by the Federal Deposit Savings & Loan Insurance Corporation, and James R. Lord, Jr., Gerhard J. Schwartz and Gerald J. Yagy in committing the aforesaid offense did assault Joan Bauer, Betsy Meisch, Sandra Power and other Columbia Banking Savings & Loan Association, Rochester, New York employees, and did put in jeopardy the life of these employees by means and use of dangerous weapons, all in violation of Title 18, United States Code, Section 2113(d)."

I have dismissed Count 2, as far as the defendant, Gerald J. Yagy, is concerned, so you will consider these two charges only insofar as they relate to Mr. Lord and Mr. Schwartz.

Again, referring to the statute, 2113(d), it says in pertinent part, "Whoever in committing or attempting to commit any offense defined in Subsection (a) -- that is what I dealt with in Count 1 -- assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device shall be guilty of an offense against the laws of the United States."

Again we have essential elements, each one of which must be proved by Mr. Houlihan, representing the Government. There are four in this instance. First, the act or acts of taking from the person or presence of another money belonging to or in the care, custody, control, management or possession of a savings and loan association; the second, the act or acts of taking such money by force or violence or by means of intimidation; third, the act or acts of assaulting or of putting in jeopardy the life of any person by the use of a dangerous weapon or device while engaged in stealing such money from a savings and loan association, and fourth, doing such act or acts willfully.

Now, as I have stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged, and the law never imposes upon a defendant the burden or duty of calling any witnesses or putting in any evidence.

This count talks of assaulting a person, and if you should find beyond a reasonable doubt from the evidence in the case that a defendant or defendants did willfully commit the robbery of the savings and loan association, then you must proceed to determine whether the evidence in the case established that that defendant or those defendants in committing such robbery assaulted or put in jeopardy the lives of Joan Bauer, Betsy Meisch or Sandra Power or some other employees, as it is charged in the indictment.

Any willful attempt or threat to inflict injury on the person of another, when coupled or combined with an apparent present ability to do so or any intentional display of force, such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault can be committed without actually touching or striking or doing the bodily harm to another. So a person who has the apparent present ability to inflict the bodily harm or injury upon another person, and willfully attempts or even threatens to inflict such harm, as by intentionally flourishing or pointing a pistol or a gun at another person, may be found to have assaulted that other person. Now, the test of whether a victim's life has been placed in danger is what we call an objective one, that is, not whether the employee was put in fear, but whether her life actually was put in danger by the use of a dangerous weapon, and in this connection you may consider testimony indicating that a gun was displayed during the robbery of the savings and loan association, although there was no direct or eyewitness evidence that the guns were loaded, with the exception of Mr. Hook's testimony that he saw Mr. Schwartz put two shells into the shotgun. Evidence that a robber displayed a gun to back up his demands may indicate to you that he wanted the victim to believe it was loaded, and you may infer that the gun was loaded from that evidence, under the rules which I will mention later in my instructions to you concerning direct and circumstantial evidence and proper and allowable inferences.

Now, a dangerous weapon or device includes anything capable of being readily operated, manipulated, wielded or otherwise used by one or more persons to inflict severe bodily harm or injury on another person. So an operable firearm, such as a pistol, revolver, shotgun or any other gun capable of firing a bullet or other ammunition may be found to be a dangerous wepon or device. If you find that Mr. Schwartz did load the shotgun with two shells, you are entitled to infer that the shotgun at least was operable.

To put in jeopardy the life of a person by the use of a dangerous weapon or device means then to expose such person to a risk of death or the fear of death by the use of a dangerous weapon or device.

Now, particularly as to the defendant Yagy in Count 1, there has been testimony offered showing that he was not present at the savings and loan association at the time of the alleged robbery. However, the guilt of a defendant, such as Mr. Yagy, may be established without proof that he personally did every act constituting the offense charged. In this connection there is another section of the Criminal Code, Section 2, which says, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal." So whoever actually does the physical act which is the crime is a principal, and whoever aids or assists or counsels or induces the doing of that act is also a principal and can be convicted and punished as a principal. Every person who willfully participates in the commission of a crime can be found to be guilty of that offense. Now, a participation is willful if it is done voluntarily and intentionally, and

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with the specific intent to do something which the law forbids or with the specific intent to fail to do something which the law requires to be done, and here, of course, we are concerned with the former, and, of course, doing this with a bad purpose, either to disobey or disregard the law.

Aiding and abetting is different from the charge of conspiracy, which I will give to you soon. As I stated before, conspiracy involves the planning of a criminal act, and aiding or abetting involves participation in the criminal act. All that is required to be proven to show that a particular individual aided and abetted is that he had actual knowledge of the commission of the robbery, in this instance that he in some way willfully assisted those who committed the robbery or counselled or induced its coming about. Now, in order to aid and abet another — and the such other could have been Mr. Hook or Mr. Lord or Mr. Schwartz, or two of those three or all three -- to commit a crime, it is necessary that the accused willfully associate himself in some way with the criminal venture,

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willfully participate in it as he would in something that he wishes to bring about, that is to say, that he willfully seek by some act of his to make the criminal venture succeed. You, of course, may not find the defendant guilty unless you find beyond a reasonable doubt that every element of the offense, as defined in these instructions, was committed by some person or persons, and that the defendant whose guilt or innocence you are considering participated or assisted in its commission. Mere presence at the scene of a crime or mere knowledge that a crime is being or to be committed is not sufficient to establish that a defendant, such as Mr. Yagy, aided and abetted the crime, unless you find beyond a reasonable doubt that he was a participant or assisted, and was not merely a knowing spectator.

I come now to the conspiracy count, Count 3 of the indictment, and that reads: "From on or about April 9, 1976, and continuously thereafter, up to and including the date of the filing of this indictment, in the Western District of New York and elsewhere, James R.

Lord, Jr., Gerhard J. Schwartz and Gerald J. Yagy, the defendants, willfully and knowingly did combine, conspire, confederate and agree with each other and with Ronald Hook, named herein as a co-conspirator but not as a defendant, and with diverse other persons to the grand jury unknown, to commit the following offense against the United States, to wit, a violation of Title 18, United States Code, Section 2113, to willfully and knowingly enter the Columbia Banking Savings & Loan Association, Rochester, New York, and by force and violence and by intimidation take from employees of that bank, the deposits of which were then insured by the Federal Deposit Savings & Loan Insurance Corporation, a sum of money belonging to and in the care, custody, control, management and possession of that bank. All in violation of Title 18, United States Code, Section 371."

You will recognize that although that refers generally to Section 2113, that the crime that is talked about is the crime that I have already defined in Count 1, which is a violation of Section 2113(a).

There are certain overt acts alleged, and I will explain what that means, but I will read it to you at the moment. It says, "In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts: (1) On or about April 9, 1976, James R. Lord, Jr. and Gerhard J. Schwartz met with Ronald Hook and drove a 1962 Buick to the Columbia Banking Savings & Loan Association, Rochester, New York. (2) On or about April 9, 1976, Gerhard J. Schwarz and James R. Lord, Jr. entered the Columbia Banking Savings & Loan Association, Rochester, New York. (3) On or about April 9, 1976, certain money taken from the Columbia Banking Savings & Loan Association, Rochester, New York was placed in a 1975 blue Chevrolet Nova. (4) On or about April 9, 1976, Gerhard J. Schwartz, James Russell Lord, Jr., Ronald Hook and Gerald J. Yagy met with each other at 65 Britton Road, Rochester, New York."

Now, this conspiracy is in violation of Section 371 of the Criminal Code, and that says, "If two or more persons conspire to commit any offense against the United States, and one of more of such persons do any act to effect the object of the conspiracy, then each is guilty of an offense against the United States.' A conspiracy to violate the law and the doing of an act. A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose. A conspiracy is a kind of a partnership in crime or for criminal purposes, in which every member becomes the agent of every other member. The gist of the offense is the combination or agreement to violate or disregard the law. Mere similarity of conduct among various persons, and the fact they may have associated with others, and may have assembled together and discussed common aims and interests, does not necessarily prove the existence of a conspiracy. However, the evidence as to conspiracy need not show that the members entered into any express or formal agreement or that they directly by words spoken or in writing stated between or among themselves what their objects or purpose was to be or the details thereof or the means by which the object or purpose was to be achieved. What the evidence must show in order to establish proof that a conspiracy existed is that the members in some way or manner or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan. It is not necessary for the prosecution to prove that all of the means or methods set forth in the indictment were agreed upon to carry out the conspiracy or that all of the means or methods were actually used or put into operation, but it is necessary that the evidence established to your satisfaction that one or more of the means or methods described in the indictment was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy, as alleged in the indictment. Now, one may become a member of the conspiracy without having full knowledge of all of the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but merely happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a conspirator. Before you could find that Mr. Lord or Mr Yagy or Mr. Schwartz or Mr. Hook, or any other person, became a member of a conspiracy, the evidence must show you that a conspiracy was formed and that the person who is claimed to have been a member knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. Now, to participate knowingly and willfully means to participate voluntarily and understandingly and with a specific intent to do some act which the law forbids, that is to say, to participate with bad purpose, either to disobey or disregard the law. So if a defendant or any other person with understanding of the unlawful character of a plan intentionally encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and willful participant, a member, a conspirator. Also one who knowingly and willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the instigators of the conspiracy.

Now, in deliberating on this question of each defendant's knowing participation or membership in the conspiracy, you must consider the evidence as to each defendant individually. You must confine your deliberations to the independent evidence as to his own actions, his own conduct, his own statements or declarations, and the reasonable inferences to be drawn from such independent evidence. You cannot base your decision as to whether or not he was a member of the conspiracy on evidence consisting only of the conduct or statements of other defendants or co-conspirators which were made in his absence.

I have read the overt acts to you, and an overt act is an act which is knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act itself need not be criminal in nature, if it was considered separately and apart from the conspiracy, it can be as innocent as the act of a man walking across the street of driving an automobile, using a telephone. It must, however, be an act which follows and tends toward an accomplishment of the plan or scheme, and it must be knowingly done in furtherance of some object or purpose of the conspiracy, as it is charged in the indictment.

This crime of conspiracy also is comprised of essential elements, of which there are four. First, that the conspiracy, which is described in the indictment, was willfully formed and was existing at or about the time alleged in the indictment. The indictment speaks from a time from on or about April 9th and continuously thereafter up to and including the date of the filing of the indictment. The date of the filing of the indictment was July 29, 1976. The conspiracy which is proved, if any has been proved, started at a time on or about or at least in the first week of April 1976 -- I again emphasize if it was formed -- and did not last later than April 9, 1976. In other words, this is that other point of where I, as the judge, will tell you as a matter of law that there just is no evidence in the case at all that would enable you to say that the conspiracy continued after April 9, 1976. Consequently, I have to tell you that the conspiracy, as far as your consideration of it, whether or not it existed, is one that ended with the passing of April 9, 1976, and I will tell you further that if you do find there was such a conspiracy, that is companionable and in step with legally the allegations of the indictment, so that even though you look at the indictment and it says from on or about April 9 to July 29, if in fact you find a conspiracy that started on or about April 1 or during the first week of April and ended April 9, I tell you that that would be sufficient to satisfy that first element. The second element is that particular defendant, whose guilt or innocence you are considering, willfully became a member of the conspiracy and, thirdly, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time or place alleged. I read four overt acts to you. If you are satisfied that a conspiracy came into being, and that individual, whose guilt or innocence you are considering, became a member of it, if you find that at least one of those overt acts did happen, if you find beyond a reasonable doubt that one of them occurred, that is sufficient, you don't have to find

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two or three of four of them. The fourth element is that the overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged. If you should find beyond a reasonable doubt from the evidence in the case that the existence of the conspiracy which is charged has been proved and, as I said, during the existence of the conspiracy at least one of the overt acts was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then the proof of the conspiracy offense which is charged is complete, and it is complete as to every person found by you to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act. Now, again, the burden is always upon the prosecution, Mr. Houlihan, and the Government, to prove beyond a reasonable doubt every essential element of the crime charged in this count, and again the law never imposes upon a defendant, any defendant here, the burden or duty of calling witnesses or producing any other evidence. Now, if and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done and the statements thereafter knowingly made by any person likewise found by you to be a member of the conspiracy, and while he is a member, can be considered by you as evidence in the case against such defendant, even though the acts and statements may have occurred in the absence and without the knowledge of such defendant, providing the acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy. Now, we have talked preliminarily and also during closing arguments of this dividing three defendants into cubicals, cubbyholes and departments, and this is one area wherein you would not observe any such structuring. If you are satisfied beyond a reasonable doubt that a conspiracy was formed involving one, two or three of these defendants, of course, Mr. Hook is also alleged to have been a member of the conspiracy, if you thereafter find that one of those members of the conspiracy in furtherance of a purpose of the conspiracy did something or said something, even though another defendant who was also a member was not present, what the first individual said or did is chargeable against the other defendant. We have an agency mechanism set up. Once you have found the conspiracy to exist and particular people to be members of the conspiracy, things that are done and said during that conspiracy and in pursuance of the conspiracy are chareable against all who are then members of the conspiracy. This is one point where the departmentalization breaks down, otherwise we get back to the departmentalization, and any act done or admission or incriminatory statement which is made outside of court by one person cannot be considered as evidence against any person who was not present and did not hear the statement made. Therefore, the acts or statements of any conspirator, which are not in furtherance of the conspiracy or which were made before it came into being or after it ended, can be considered as evidence only against the person doing them or making them.

Now, the indictment charges conspiracy against these three defendants and Ronald Hook, Mr. Hook being named in the indictment as a co-conspirator, as a member of the conspiracy, but not named as a defendant. Now, a person cannot conspire with himself, and therefore you cannot find any defendant guilty of the conspiracy unless you find beyond a reasonable doubt that he participated in a conspiracy with at least one other person, whether it was with one of the other named defendants or with Hook or, as the indictment charges, diverse persons to the grand jury unknown. While the parties to the conspiracy must know of each other's existence, it is not necessary for all of the conspirators to know each other or to have direct contact with each other. In your consideration of the evidence as to the offense of conspiracy, you should first determine whether or not the conspiracy existed, as alleged. If you conclude that the conspiracy did exist, then you next determine whether or not a particular defendant, whose guilt or innocence you are considering, knowingly and willfully became a member of the conspiracy, and if it appears from the evidence beyond a reasonable doubt that the conspiracy was knowingly and willfully formed, as alleged, and that a defendant knowingly and willfully became a member of the conspiracy at its inception or afterward, than the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

Now, an act is done knowingly if it is done voluntarily and intentionally, and not because of mistake or accident or some other innocent reason. The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or accident or other innocent reason. Now, with respect to the offense charged in this case, specific intent must be proved beyond a reasonable doubt before there can be a conviction. An intent is the purpose or aim or state of mind with which a person acts or fails to act, and an act or failure to act is knowingly done or not done if it is done voluntarily and intentionally and, again, not because of mistake or accident or other innocent reason. Intent, you will recognize, may be proved by indirect or circumstantial evidence, and rarely can be proved by any other means, because while witnesses can come into the courtroom, and they can see and hear and come in and say what they have seen and heard, they cannot, of course, have any look into any inner reaches of the mind so they can come in before you and say what a person's state of mind is. So unless otherwise instructed, in determining any issue involving intent, you can consider all of the facts and circumstances, which are in evidence in the case, which will aid you in determining from the same what the intent was.

Now, generally there are certain rules of law, and I have mentioned some, which are common to all criminal cases and which you must apply in your reviewing the evidence which is before you. A basic rule in all criminal cases is that a defendant, in this case each defendant, is presumed to be innocent, and that presumption of innocence remains with each defendant throughout the trial, and continues to exist until such time as each of you, as a matter of fact, all of you, unanimously have been convinced beyond a reasonable doubt by legal and competent evidence that a particular defendant is guilty of the offense or offenses charged. The burden

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of proof, as I have said, that a person is guilty beyond a reasonable doubt rests with the Government at all times, it never shifts to a defendant. In order to sustain its burden, the Government must present proof which is sufficiently strong to convince each of you of a defendant's guilt beyond a reasonable doubt. Now, the requirement that the prosecution prove a defendant's guilt beyond a reasonable doubt extends to every essential element of a crime charged against him, but in determining whether the guilt of a defendant as to each and every essential element of a crime has been established, you are not limited to the proof from the Government's witnesses. If you are satisfied from a review of all of the evidence in the case, both the Government's and the defendants', that the evidence as to a particular account established guilt beyond a reasonable doubt, you may convict such defendant on that count but, on the other hand, if you have a reasonable doubt at any point with respect to a particular count under consideration, then you must acquit the defendant on that count, you must declare him not guilty. You will, of course, be separately weighing and determining the evidence as to each count of the indictment, that is, you will determine the guilt or innocence of each defendant as to each count of the indictment separately.

I promised to define the term "reasonable doubt." A reasonable doubt is a doubt which is based upon reason and common sense, and arises from the state of the evidence. Of course, it is rarely possible to prove anything to an absolute certainty, so proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. The defendant is not to be convicted on mere suspicion or conjecture. A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Because the burden is upon the prosecution to prove beyond a reasonable doubt that the defendant is guilty of every essential element of each of these crimes charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof, and a defendant may also rely upon evidence brought out on cross examination of the prosecution's witnesses and, again, the law does not impose upon the defendant the duty of producing any evidence. Now, remember that a reasonable doubt is such a doubt as is based upon reason and as appeals to your power of logic. It is a doubt for which you have a reason, whether or not you have the ability to put that reason into words. It is a doubt arising out of something tangible in the evidence in the case or something lacking in the case. You are to distinguish it from a doubt which might be based upon some emotion, such as upon a whim or fancy or a feeling. If you feel uncertain and you are not fully convinced that a defendant is guilty of the crime charged, and you believe you are acting in a reasonable manner, and you believe a reasonable man or woman in any matter of like importance would hesitate to convict because of such a doubt as you have, that is a reasonable doubt, to the benefit of which the defendant is entitled. If you have such a doubt you must acquit such defendant, you must find him not guilty. A reasonable doubt in your mind as to any essential element of the crime entitles a defendant to an acquittal of that particular crime. However, the rule that the Government must prove every essential element of a crime beyond a reasonable doubt does not mean that you have to believe the testimony of every Government witness as being true beyond a reasonable doubt or that each piece of evidence that the Government has offered is true beyond a reasonable doubt. It only means that the credible evidence, as weighed and found by you under these instructions, and as viewed as a whole, must establish every essential element of the crime and of the defendant's guilt beyond a reasonable doubt.

Now, as the sole judges of the facts, you have to determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it. At times during the trial I sustained objections to questions which were asked and I did not let the witness answer, and on a couple of occasions where an answer was made I instructed you that it was stricken from the record, and I told you to disregard it and dismiss it from your minds. So you may not draw any inference from an unanswered question or from any evidence that I have stricken from the record. The law requires that your decision be made solely upon the competent evidence which you have before you, and items such as that that I have excluded from your consideration are not legally admissible and they must not be considered.

"Each defendant is entitled to have his guilt or innocence as to each of the offenses charged determined from his own conduct and from the evidence which applies to him, as if he were being tried alone. The guilt or innocence of any one defendant of any of the crimes charged should not influence your verdict as respecting the other defendants. You may find any one or more of the defendants guilty or not guilty, nevertheless you must relate the evidence only as to that defendant or those defendants for whom it is received. In any event, you must determine the guilt of a defendant as to each separate charge by giving consideration to the evidence which applies to him as to each count. Now, again, that sounds like departmentalization, and it is, the single exception is I have noted as to Count 3, when you are dealing with conspiracy, and I won't repeat that, you have in mind that that is the exception to that departmentalization.

You have to decide, and you are the sole ones to do it, concerning the credibility, the believability of the witnesses, and the weight which their testimony deserves. You should carefully scrutinize the testimony given and the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Now, a witness in the course of his or her testimony may have acknowledged a criminal record or admitted other unlawful or reprehensible conduct or activities, perhaps even admitted lying in the past. Naturally, you will cautiously and carefully weigh all such facts and circumstances to determine what effect, if any, those facts and circumstances may have upon such witness's believability. Similarly, you can consider any bias or prejudice which may have been demonstrated by a witness or any demonstrated hope of leniency or reward to be gained through testifying. Now, this is not to say that because a given witness may be a rather unsavory character in some respects that you not credit his or her testimony on the stand. You are to judge each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Judge also any relation each witness may bear to either side of the case, and the manner in which any witness may be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence. Now, of course, the mere fact that the testimony of a witness is inconsistent or that there are discrepancies in such testimony does not mean that you have to reject the witness's credibility. You must determine whether the inconsistency or discrepancy is a result of falsification or whether, on the other hand, it is a result of innocent miscalculation or inaccurate observation or memory. If you find that any witness has lied, has testified falsely with respect to any material portion of his or her testimony, you may disregard that portion which you find to be unbelievable or, if you want, you may disregard the entire testimony of that witness. Now, in evaluating credibility, of course, you will determine whether or not the testimony of a given witness was inherently improbable or contradictory with respect to any material fact, as judged by your experience and by other evidence in the case, and relating back to this disregarding of all or a portion of the witness's testimony where you found the witness lied or testified falsely, a person only testifies falsely or lies if he does so intentionally, and you have to distinguish that from something that may merely be erroneous because of some mistake or innocent miscalculation or some inaccurate observation or some faulty memory.

Now, normally, as you have observed, witnesses are not permitted to state their opinions, and are only permitted to come in here until what they have seen or heard or done or said, but there are some persons who can come into a courtroom who are deemed to be experts in certain callings or fields due to their particular training and experience, and they are permitted to give their opinions in that particular field of expertise. We had two such in this case, Dr. Abello and Dr. Newton, who are experts in their respective fields. Now, these are given to you for your consideration, and you are to consider such opinion testimony if and to the degree you find it reliable. You may disregard it if you find either witness was not sufficiently expert or if the reasons stated from the opinion does not support the opinion or if you find that the opinion is not credible in view of all the other evidence in the case. These doctors' opinions can be and were based upon -- well -- they can be based upon what we call objective findings, which might be a situation where a doctor by palpation can actually feel muscle spasm, or whereas to Mr. Schwartz he underwent a myelogram testing and that certain results were shown from that, these would be objective findings, or the opinion could be based upon what we call subjective findings or considerations, which would be the patient's own claims of pain, or a combination of both. Now, to the extent that a doctor's opinion is based on what the patient told the doctor, you have to consider the reliability and credit to be given to the patient's statements to the doctor and, of course, if they are not reliable then, of course, the doctor's opinion founded thereupon would also not be relied upon.

We had identification testimony here as to all of the defendants as being the persons who did certain criminal acts, and this is a key element of the Government's burden of proof in this case, and in considering identification testimony you are to keep in mind that such testimony should be considered with great caution. There is no class of testimony that is more uncertain or least to be relied upon than that as to identity. Identification testimony is an expression of belief or impression by the witness. Its value depends again on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification at a later point. I think in this case we depart from the normal identification problem where if one of these robbers or both of them had come into the bank without being masked so their features would be observed and remembered by someone, and a teller or someone else in the bank came forward later and said yes, this happened and that happened, and this is the man that did it, then you would be worried more about how much of an opportunity the tellers had or the other person had to observe the robber and how dependable that was. In our situation in our case we do not truly have that, except in the situation of Mr. Wakefield in his identification of a person who was introduced to him as Jimmy, and the result of that was that Mr. Wakefield indicated that he was not at all positive that Mr. Lord was the Jimmy who was there earlier in April with Mr. Schwartz at Mr. Wakefield's home. He thought he was, but he wasn't positive. Now, on that type of situation you have to judge Mr. Wakefield's opportunity to really see and remember what this Jimmy looked like, and to remember at this time. Otherwise, we have a situation where Mr. Hook, if you believe him, having a long time acquaintance with say Mr. Yagy, says this is Mr. Yagy, where he, again if you believe him, had certain things to do over the period of time with Mr. Lord, and to a lesser period of time with Mr. Schwartz. Now, I think we are in an area where we come basically to the credibility of the witness, rather than questions of opportunities for observations and circumstances where the identification testimony would be reliable. Now, I emphasize, of course, that it is an important burden of proof that the prosecutor has as to every element of the crime and, of course, it specifically includes the burden of proving to you beyond a reasonable doubt the identify of a defendant as a perpetrator of the crime of which he is charged. Now, if you do have a reasonable doubt as to the accuracy of identification, and you find that otherwise a particular defendant has not been shown to your satisfaction and beyond a reasonable doubt to have been a participant, then you would find that defendant not guilty.

Mr. Ronald Hook I have mentioned and, of course, he stands in a particular situation in this case. The indictment charges him in Count 3 with being a co-conspirator. He is not named as a defendant, and Mr. Houlihan has argued to you concerning that and why it comes about, but from his own testimony he has involved himself in this bank robbery of the savings and loan association and, consequently, we have to consider him as being an accomplice in the carrying out of this robbery. Now, an accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent, and an accomplice does not become incompetent as a witness because of participation in the criminal act charged but, on the contrary, his testimony can be received in evidence and can be considered by you even though it is not corroborated or supported by other evidence. You have to keep in mind that such testimony is to be given close and searching scrutiny, and is to be received with caution and weighed with great care. You are not to convict a defendant upon the unsupported testimony of an accomplice unless you believe that unsupported testimony beyond a reasonable doubt. Mr. Houlihan, of course, has argued that Mr. Hook was an innocent pawn. You may find that is true or you may find that Mr. Hook, despite his age, was quite sophisticated and aware of what was going on. Even if you find the latter, that he had himself all kind of evil knowledge, motivation and voluntary participation, eager participation perhaps, and he comes to the witness stand in that guise, this does not mean that you automatically must say that his testimony is not credible. It is up to you to decide with all of those circumstances in mind, and as you watched him and heard him, whether or not you believed him. Now, if you do believe him, and you find that what he was saying was true, then you can rely upon that, even though there may be certain important areas, many important areas of his testimony that you find supported in other evidence in the case. In judging the testimony of Mr. Hook you have to follow those instructions, it is very important.

Generally there are two types of evidence from which you can find a defendant guilty. We have direct evidence or eyewitness evidence, where someone has seen or heard something or himself done or said something, and comes on the witness stand and testifies directly about that, and this is called direct evidence or eyewitness evidence. But, on the other hand, we also have circumstantial evidence, where proof of a chain of circumstances point to the commission of an offense, and you are entitled to and you may find we have both types of evidence in this case, and that they bear upon the question of the innocence or guilt of a defendant, and you can consider both types. As a general rule, the law makes no distinction between direct and circumstantial evidence. It simply requires that before a defendant is convicted that you be satisfied of his guilt beyond a reasonable doubt.

I mentioned inferences at one point. Basically an inference is nothing more than a deduction or a conclusion which reason and common sense lead you to draw from facts which have been proven. Any inference which you draw from the evidence must reasonably flow from the evidence, and be based upon facts established by the evidence. Because a permissible inference in law must flow naturally and logically from and be based on facts established by the evidence, it follows that you may not base further inferences merely upon inferences already drawn. One inference may not be based upon or drawn from another inference. It can only be based upon or drawn from evidence which you find in the case. Now, in the course of your consideration of all of the evidence as to a particular defendant and a particular crime, if you find certain evidence admits equally of two inferences, one supporting his innocence and the other supporting his guilt, you must accept the inference supporting his innocence and you must reject the inference supporting his guilt.

Now, conduct of a defendant, and that can include statements knowing they made acts knowing done, upon being informed that a crime has been committed or upon being confronted with a criminal charge can be considered by you in the light of all other evidence in the case in determining his guilt or innocence. When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence, and this explanation or statement is later shown to your satisfaction to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt. Ordinarily it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence. Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within your province. Again, a statement or act is knowingly made or done if it is made or done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Always bear in mind that the law never imposes upon a defendant in a criminal case the duty or burden of calling any witnesses or producing any evidence. We have evidence in the case that the defendant Schwartz has made several statements, particularly a certain statement. " The evidence relating to any statement claimed to have been made by a defendant outside of court and after a crime has allegedly been committed should always be considered with caution and weighed with great care, and only after all evidence in the case convinces you beyond a reasonable doubt that the statement was knowingly made. Now, in determining whether a statement claimed to have been made by a defendant outside of court and after a crime has allegedly been committed was knowingly made, you should consider the defendant's age and sex and training and education and occupation, and his physical and mental condition, and his treatment while in custody or under interrogation, as shown by the evidence in the case, and also all other circumstances in evidence surrounding the making of the statement, including whether before the statement was made the defendant knew or had been told and understood that he was not obliged or required to make the statement claimed to have been made by him, that any statement which he might make could be used against him in court, that he was entitled to the assistance of counsel before making any statement, either oral or in writing, and that if he was without money or means to retain counsel of his own choice, an attorney would be appointed to advise and represent him free of cost and obligation. Now, a statement is knowingly made if it is made voluntarily and intentionally, and not because of mistake or accident or other innocent reason. If the evidence in the case does not convince you beyond a reasonable doubt that a statement was made voluntarily and intentionally, you should disregard it entirely. On the other hand, if the evidence in the case shows beyond a reasonable doubt that the statement was in fact voluntarily and intentionally made by the defendant, you may consider it as evidence in the case against the defendant." Mr. Schwartz's admissions, if you find them to have been made voluntarily and intentionally, can be used only as against him. Any conspiracy to rob the savings and loan association had by November 22, 1976 come to an end, and, of course, you will remember that that was the date as of which that statement was given. His statement as of that date could not be chargeable to any co-conspirator if, in fact, you found there was a conspiracy and that he and another defendant were members at some time. As I have indicated to you, there is no evidence to support the continuance of the conspiracy beyond April 9, 1976. In any event, you would recognize that an admission of guilt would not be an act or statement in furtherance of the aim of the conspiracy." However, I tell you this one thing, if you have found that there was a conspiracy and that Mr. Schwartz was a member of the conspiracy on April 9, 1976, which is the alleged date of the robbery of the savings and loan association, and if you find that, for example, Mr. Yagy or Mr. Lord was also a member of that same conspiracy at the same time, and if you decide on the basis of the admission, and otherwise, that Mr. Schwartz did what he says in the statement he did do, then what he did do on April 9, 1976 could be usable against and charged against those other defendants who you found to be members at that same time. So the making of the statement on November 22nd cannot itself be used against any other defendants, but if on the basis of that, and otherwise, you find that Mr. Schwartz, for example, did participate in a robbery of this association on

April 9, and there was a conspiracy for that, and Mr. Lord or Mr. Yagy was a member, then Mr. Schwartz's actions on the 9th of April are chargeable against Mr. Lord or Mr. Yagy if they were members at that time.

Now, you are instructed as a matter of law that you are not to be influenced by the fact that the Government of the United States is a party to this action. The Government is the same as any other party, Mr. Houlihan, the Assistant United States Attorney, is the same as any lawyer. The Government is the prosecutor, and I told you -- maybe I told you, maybe I did not -- but in any event, we are not here trying lawyers or deciding which lawyer is a better lawyer or more to be liked or less to be liked than some other, you are here to try the guilt or innocence of three defendants, and whether you like lawyers or don't like them, you are to put that matter aside, and you are to determine merely the guilt or innocence of the defendants. Also, you are not to concern yourselves in any way with the punishment which a particular defendant might receive if he is convicted, because punishment will be a matter with which only I would be concerned, and only, of course, if you would convict particular defendants on one or more of the charges that are levelled against him. Again, you are the ones to find the facts, and any examples which I have given do not indicate any opinion of mine, except my flat declaration to you as to the time of termination of the conspiracy, otherwise you are the ones who make the decisions.

Now, when you come to a verdict, the verdict as to the guilt or innocence of each defendant, it has to be reached unanimously, with all twelve of you agreeing in the result. Under these instructions you can find one or more of the defendants guilty as charged or innocent, or any time during your deliberations you can come into court with a verdict of guilty or not guilty as to any defendant concerning whom you unanimously agree. In the normal course, unless you run into some pitfalls, you would be pursuing your whole deliberation and reaching your verdict as to each defendant on each count and reporting them at one time in court. But if we run into sticky situations, you can, of course, report a verdict of innocence or guilt as to any defendant on any count where you have unanimously agreed. You have to give separate and personal consideration to the case of each defendant. You must analyze what the evidence in the case shows with respect to that individual, leaving out entirely any evidence, if any, which has been admitted solely against some other defendant. Each defendant is entitled to have his case determined from the evidence as to his own acts and statements and conduct, and any other evidence in the case which may be applicable to him.

I am sending a copy of the indictment to the jury room with you, actually the original indictment. It has been marked Court Exhibit C. I told you before, and I tell you again, the indictment is not evidence, it is merely a device which we use to tell these defendants of the charges which have been lodged against them. You are not to consider it as tending to prove or proving anything whatsoever.

Now, finally, I would remind you of the oath you took that you would well and truly try these issues joined in this case and a true verdict give according to the evidence, so help you God. I tell you if you follow that oath and apply that oath, and you do not combine your thinking with any emotion, that you will arrive at a true and just verdict. But if you get into an emotional state, and you let bias or sympathy or prejudice interfere with your thinking, you will not arrive at a true and just verdict. As you deliberate, listen to the opinions of the other jurors, and ask for an opportunity to express your own views. No one juror holds center stage in the jury room, and no one juror monopolizes the deliberations. After you have listened to the other jurors and you have stated your own views, if you become convinced that your view is wrong, do not hesitate because of stubbornness or pride of opinion to change your view. On the other hand, do not surrender your honest conviction solely because you are outnumbered.

Now, as I say, your verdict must be unanimous, it must represent the absolute conviction of each one of you. You will have several verdicts to render. As to Count 1, you must decide whether James R. Lord, Jr. is guilty or innocent, guilty or not guilty of the charge of having violated Section 2113(a) or having aided or abetted such violation by another. You must decide whether Gerhard J. Schwartz is guilty or innocent of having violated that same section or having aided or abetted someone else in violating it, and you must make that same decision relative to Gerald J. Yagy again as to whether he violated the section or whether he aided or abetted such violation by another. Then as to Count 2, you have the same decision relative to James R. Lord concerning Section 2113(d), whether he violated it or whether he aided and abetted violation by another, and you have that same decision and verdict concerning Mr. Schwartz. As to Count 3, again we have all three defendants involved, and you have to decide whether each one violated Section 371, which was the statute concerning conspiracy, by conspiring with another person to violate Section 2113(a).

Now, finally, as you go to the jury room, as your first order of business, you should select some one of your number who will speak for you when you come back into the courtroom, and all communication that you have from the deliberation room will come to me by means of a note that you will hand to the deputy marshal who will be on duty outside of your room, and the deputy marshal will see that I get the note, and I will act accordingly. Do not ask the deputy any questions about your duties. You can ask me questions, you can get a clarification of any instructions or a reading of my instructions or all or part of the testimony of any witness. Tell me also when you have reached a verdict, tell me by a note when you have reached a verdict, or in appropriate circumstances where you find you just are not able to reach a verdict, tell me also that, but never tell me or anyone else how your voting stands at any certain time, some intermediate time, except when you come into court to report a verdict of guilt or innocence as to a defendant on a count.

Now, gentlemen, do you have any exceptions or requests and, if so, do you want to be heard outside the presence of the jury?

MR. HOULIHAN: No requests or exceptions, your Honor.

MR. KREMER: The defendant Lord has one request and one exception. We will be bound by whatever the Court decides as to where and when it is heard?

THE COURT: Mr. Morehouse?

MR. MOREHOUSE: No requests or exceptions.

THE COURT: Mr. Colicchio?

MR. COLICCHIO: Yes. On behalf of the defendant Yagy, I request that the Court charge the jury that it can't find Mr. Yagy was a member of the conspiracy by reason of Mr. Schwartz's statement, attributed to him, that occurred sometime in November.

THE COURT: That is true. I said when you are determining whether someone is a member of the conspiracy, you must look only to that person's own acts and statements, you do not look to anything someone else did or said outside of that person's presence. So as to Mr. Yagy, you must look to what he did, what he said, or what was done or said in his presence in determining whether or not Mr. Yagy was a member of the conspiracy.

MR. COLICCHIO: Thank you.

THE COURT: Tell me at sidebar.

MR. KREMER: Surely.

THE COURT: Then I will decide whether it should be out in the presence of the jury.

(Thereupon an off the record discussion ensued at the sidebar.)

THE COURT: I think I have said this twice, but again I want to make sure you understand. This concerns the statement made by Mr. Schwartz on November 22, 1976. The giving of the statement, obviously, at a time when there was no longer a conspiracy cannot itself weigh against any other defendant. If from the statement, and with or without other evidence, you decide that Mr. Schwartz on April 9, 1976 did certain acts in the bank robbery, and if you have found that there was a conspiracy at that time, and Mr. Schwartz was a member at that time, and another defendant or defendants was a member at that time, then those actions of Mr. Schwartz on the 9th can be used against the other defendants, but his statement made later cannot be. Does that meet your approval?

MR. KREMER: Just to again emphasize the statement itself cannot --

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THE COURT: I said it three times.

MR. KREMER: Thank you, your Honor. All right. Swear the deputy marshals.

(Thereupon two deputy marshals were duly sworn.)

THE COURT: I will say one thing, I've been guilty of another misjudgment of time. I said forty minutes, and I think I went twice that long. I am sorry. All right, the exhibits will come to you in the jury room, the indictment will be there as Court Exhibit C. Mr. Miller, you will have to remain behind. I assume you have some clothing in the jury room?

ALTERNATE JUROR: Yes, your Honor.

THE COURT: We will see that is gotten out for you.

(Thereupon the jury exited the courtroom at 2:40 P.M.)

THE COURT: Mr. Miller, this has to be in some regards an unsatisfactory end to the long hard week, whereafter paying close attention to the evidence, and I observed that you were throughout, you are now foreclosed from participating

* * * * * *

EXCERPT FROM YAGY DISCOVERY MOTION.

actually in operation on the date of the alleged bank robbery. Furthermore, defendant through his attorney, demanded that defendant be furnished a copy of any written statement or affidavit given, taken from or otherwise obtained, whether signed or unsigned, from Ronald Hook.

5. Before said items were produced to defendant or his attorney and before the preliminary hearing was held, the May 1976 session of the Federal Grand Jury returned indictment #76/131 against the above named defendants, including Gerald Yagy, which indictment, upon information and belief, was filed on July 29, 1976.

6. Pursuant to said indictment, defendant Yagy and others were indicted for allegedly violating Sections 2113(a) and (b) and Section 371 of Title 18, United States Code.

This affidavit is made by deponent in support of an application in behalf of defendant Yagy for a number of different forms of relief shall hereinafter be set forth under separate headings. Defendant Yagy is presently confined to Veterans Administration Hospital in Batavia, New York for treatment of a pre-existing condition and, therefore, is not presently available for purposes of signing subject or a supporting affidavit.

7. Upon information and belief, on or about July 19, 1976, the Rochester office of the Federal Bureau of Investigation participated with the Monroe County Sheriff's office, the

* * * * * *

LETTER, dated 9-7-76 from Roy E. Colicchio, Esq. to Assistant U.S. Attorney Gerald J. Houlihan, Esq.

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TELEPHONE (305) 565-9503

September 7, 1976

Gerald J. Houlihan, Esq.
Assistant United States Attorney
United States Courthouse
Rochester, New York 14614

Re: United States of America vs. Gerald J. Yagy, et al
#76/131

Dear Sir:

We enclose a copy of the notice of motion pertaining to the above matter returnable at the Federal Courthouse, Rochester, New York on September 13th.

The motion papers will have been served earlier. However, However, Me. Yagy has been a patient at the Veterans Administration Hospital at Batavia, New York.

We have no objection if you wish an adjournment of the motion to be heard later than September 13th.

Very truly yours,

REC:mmb
Encs.

LETTER, dated 9-21-76 from Roy E. Colicchio, Esq. to Assistant U.S. Attorney Gerald J. Houlihan, Esq.

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September 21, 1976

RECEIVED
ROCHESTER, N. Y.
SEP 22
UNITED STATES ATTORNEY

Gerald Houlihan, Esq.
Assistant U. S. Attorney
U. S. Courthouse
Rochester, New York 14614

Re: U. S. vs. Gerald Yagy

Dear Sir:

We have been advised by Judge Burke's secretary that the discovery motion in the above entitled matter returnable on September 27, 1976 may be either heard in Federal Court in Buffalo or otherwise adjourned for Judge Burke's attention on November 8, 1976.

We have advised the Judge's secretary that we elect to have this motion adjourned until November 8, 1976 to be heard by Judge Burke at Rochester, New York.

Very truly yours,

REC:mmb

xc: Mr. Yagy

AFFIDAVIT OF YAGY RE: SETTING TRIAL DATE.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,
Plaintiff
-vs-
GERALD YAGY,
Defendant

CR. # 76/131

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

ROY E. COLICCHIO, being duly sworn, deposes and states that:

1) Deponent is an attorney duly licensed to practice his profession in the State of New York and before the United States District Court for the Western District of New York; that he is a member of the law firm of Cucci, Welch, Colicchio & Weinstein, attorneys for defendant Gerald Yagy with respect to the above-entitled matter.

2) Defendant Yagy was indicted by a Federal Grand Jury on or about July 29, 1976; that said defendant was arraigned before Honorable Harold P. Burke, Justice of the U.S. District Court on July 30, 1976 at Rochester, New York; that pre-trial motions were brought in said Court, returnable September 13, 1976, which motions were adjourned at the request of Gerald J. Houlihan Assistant U.S. Attorney, to September 27, 1976.

3) Said pre-trial motions were not heard or disposed of on September 27, 1976 because of the physical incapacity and hospitalization of Judge Burke and, as a result thereof, said

motions were adjourned to be heard before Judge Burke on November 8, 1976. To date, deponent, as defendant Yagy's Attorney, has not received any answering affidavits from the U.S. Attorneys Office in opposition to said motions, although an informal conference has been held with Assistant U.S. Attorney Houlihan.

4) Recently, deponent was advised by Mr. Houlihan's office that the Yagy case has been set down for trial for October 13, 1976 before Circuit Court of Appeals Judge Ellsworth Van Graafeiland. Deponent, however, has advised Judge Van Graafeiland and Mr. Houlihan by letter that deponent is not and cannot be ready for trial until the pretrial motions have been heard and determined and any subsequent pretrial motions that may be necessary to be brought on as a result of information learned as a result of the first set of pretrial motions having been had.

5) In addition to the foregoing, deponent has been advised by defendant Gerald Yagy that he has again been admitted to the Veterans Hospital in Batavia, New York for rectal surgery which is scheduled to take place on or about October 8, 1976 and that said defendant will be indisposed either at said hospital or otherwise recuperating at his home in Rochester, New York for a period of at least four (4) weeks. A medical report substantiating Mr. Yagy's condition has been ordered from the treating physician at the Veterans Hospital and will be furnished to the U.S. Attorneys Office upon receipt of the same.

6) Although the U.S. Attorneys Office has served

notice that they are ready for trial, it is obvious that defendant Yagy is not ready for trial and will not be ready for some time for the reasons above-stated.

7) Deponent also wishes to point out that according to the motion papers brought on by the U.S. Attorneys Office dated September 30, 1976, which papers were received by deponent's office on October 4, 1976, the Yagy case is No. 43 out of the 43 cases set forth in the U.S. Attorneys motion papers. It would appear that the cases should be disposed in the numerical order in which they appear in said motion papers rather than attempting to try case No. 43 prior to the disposition of the 42 prior cases.

8) This affidavit is made in response to the motion brought on by the U.S. Attorneys Office requesting the assignment of one or more judges to assume the responsibility for the disposition of the 43 cases listed in said papers.

CUCCI, WELCH, COLICCHIO & WEINSTEIN
By: ROY E. COLICCHIO
Attorneys For Def. Yagy

Sworn to before me this
12th day of October, 1976.

Commissioner of Deeds
Expires 8 13 77

LETTER, dated 9-24-76 from Roy E. Colicchio, Esq. to The Honorable Ellsworth A. Van Graafeiland.

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TELEPHONE (305) 565-9508

September 24, 1976

Honorable Ellsworth A. Van Graafeiland
United States Justice Court Chambers
United States Courthouse
Rochester, New York 14614

Re: United States of America vs. Gerald Yagy
Int. 76-131

Dear Judge Van Graafeiland:

We were advised by Assistant U. S. Attorney Gerald Houlihan on September 22, 1976, that you have set the Yagy case down for trial on October 13, 1976.

We wish to advise you that we brought on an extensive pre-trial motion for numerous items of discovery, bill of particulars, production of various documents and items and for an order dismissing the subject indictment on various grounds. The motion was originally returnable before Judge Burke on September 13, 1976. At the request of the U. S. Attorney, the motion was adjourned to September 27, 1976. However, due to Judge Burke's recent hospitalization we have been informed that the motion will not be heard on September 27th but rather we were given the option of travelling to Buffalo to argue the motion at some convenient date or otherwise adjourn the motion so that the same could be heard by Judge Burke on November 8, 1976. We consented to an adjournment to November 8th.

Mr. Houlihan has now offered to confer with me and have a voluntary disclosure and production of at least some of the items that we have asked for. We are to meet on the afternoon of September 28th. Although I do not wish to be pessimistic, I do not believe Mr. Houlihan will disclose and produce all of the items that we requested on a volun-

LETTER, dated 9-24-76 from Roy E. Colicchio, Esq. to The Honorable Ellsworth A. Van Graafeiland.

Page 2

tary basis, the result of which would mean that the motion, at least in part, would still have to be argued before the Court. In any event, depending upon the matters disclosed and/or produced either voluntarily or by Court order, the undersigned, as attorney for defendant Yagy may very well be in a position to bring on an additional motion for production of other items or in support of further motions to dismiss the indictment. In any event, it would appear that defendant Yagy or I will be ready for trial on October 13th. I have conferred with defendant Yagy on these matters and he advises me that he demands full presentation and argument of the pending motions as to those items not voluntarily produced by the United States Attorney and that he will insist that all pre-trial motions be asserted before answering the case ready for trial.

not [illegible] ready trial [illegible] REC 9/28/76

I would like to confer with you on this matter, together with Mr. Houlihan, after my conference with the United States Attorney's Office scheduled for 2 P.M. September 28th.

Please advise.

Very truly yours,

REC:mmb

xc: Gerald Houlihan, Esq.
Assistant U. S. Attorney
United States Courthouse
Rochester, New York 14614

LETTER, dated 9-29-76 from Roy E. Colicchio, Esq. to Honorable Ellsworth A. Van Graafeiland.

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September 29, 1976

RECEIVED
ROCHESTER, N. Y.
SEP 3
UNITED STATES ATTORNEY

Honorable Ellsworth A. Van Graafeiland
United States District Court Judge
United States Courthouse
State Street
Rochester, New York 14614

Re: United States of America vs. Gerald Yagy
Indictment #76-131

Dear Judge Van Graafeiland:

Reference is made to our letter of September 24, 1976 pertaining to the above matter. We wish to correct an error contained in the second page which states in words and substance that we will be ready for trial on October 13, 1976. The sentence should have stated that we will not be ready for trial on October 13th.

I have met with Assistant U. S. Attorney Houlihan on September 28th. There are a large number of items that Mr. Houlihan declines to disclose or produce or otherwise satisfy in accordance with the motion papers, and in addition, said motion papers include two motions to dismiss the indictment, all of which matters will have to be argued before the District Court on the adjourned motion date scheduled for November 8, 1976.

Very truly yours,

REC:mmb

cc: Gerald J. Houlihan, Esq.

PROCEEDINGS OF OCTOBER 25, 1976.

MR. COLICCHIO: Good afternoon, your Honor.

THE COURT: Mr. Colicchio.

MR. COLICCHIO: I believe Mr. Houlihan just went through that door looking for your Honor.

THE COURT: It is a rabbit warren to one who is untoward in its ways.

MR. COLICCHIO: Your Honor, this is Mr. Yagy.

THE COURT: Mr. Yagy, how do you do?

MR. COLICCHIO: He is sitting on pins and needles because of his surgery.

THE COURT: Where is Mr. Houlihan, we seem to have lost him completely.

MR. COLICCHIO: He just came in.

THE COURT: All right.

(Mr. Houlihan now present.)

THE COURT: Go ahead, Mr. Colicchio.

MR. COLICCHIO: If the Court please, before proceeding with the argument for a motion, I would like to point out to the Court a matter I referred to this morning regarding Gerald Yagy, about his availability. Mr. Yagy underwent surgery at the Veteran's Administration Hospital in Batavia on October 13, 1976. I have a letter from the staff surgeon, dated October 18, advising us that Mr. Yagy is still on surgical ward and will need at least two or three weeks more for the treatment before even making a determination of complete recovery. Although Mr. Yagy is in the courtroom today, he was allowed on a released period from the hospital to come home for several days, he has to go back Wednesday.

THE COURT: Do I understand that because of that physical situation that he is not now capable of enduring a trial?

MR. COLICCHIO: That is true, your Honor.

THE COURT: It would be two or three weeks?

MR. COLICCHIO: According to the doctor's letter, a copy of which I will furnish the United States Attorney.

THE COURT: All right.

MR. COLICCHIO: In addition, one of the other reasons we are not ready is the fact that the motions had not yet been argued, also the matter of the co-defendant, Mr. Lord, as to whatever his situation may be with his new attorney, whoever that may be.

* * * * * *

BEST COPY AVAILABLE

LETTER, dated 12-7-76 from Assistant U.S. Attorney Gerald J. Houlihan, Esq. to Roy E. Colicchio, Esq.

United States Department of Justice

ADDRESS REPLY TO
UNITED STATES ATTORNEY
ATTENTION OF
ASSISTANT SHOWN BELOW

UNITED STATES ATTORNEY
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
ROCHESTER, NEW YORK 14614

OUR REFERENCE
GJH:kmq

December 7, 1976

Roy E. Colicchio, Esq.
44 Exchange Street
Rochester, New York 14614

Re: U.S. v. Gerald J. Yagy, et al., Cr. 76-131

Dear Roy:

Enclosed is the Government's response pursuant to Judge Elfvin's request. Any additional information that you wish to discover in connection with this case should be set out specifically in a letter responding to the Government's position. I have enclosed all of the information I agreed to voluntarily disclose to you. I assume that all matters in connection with this case are completed.

Very truly yours,

RICHARD J. ARCARA
United States Attorney

By: GERALD J. HOULIHAN
Assistant United States Attorney

Enclosure

LETTER, dated 11-17-76 from Alfred P. Kremer, Esq. to Assistant U.S. Attorney Gerald J. Houlihan, Esq.

ALFRED P. KREMER
ATTORNEY AND COUNSELLOR AT LAW
200 TIMES SQUARE BUILDING
ROCHESTER, NEW YORK 14614
716 546-6040

RECEIVED
ROCHESTER, N.Y.
NOV
UNITED STATES ATTORNEY

November 17, 1976

Gerald J. Houlihan, Esq.
United States Attorneys Office
United States Court House
Rochester, New York 14614

Re: United States -vs- James R. Lord

Dear Mr. Houlihan:

I have been assigned by the Hon. John T. Elfvin to represent the above-named individual charged with violation of section 18, the United States Code 2113 (a) (d) and 18 U.S.C. 371. I am in the process of preparing a substitution of attorney and will serve the same on Charles Crimi, Esq., and request that he turn over his file to me. It is my understanding that discovery motions were made.

Without consulting with my client and investigating the matter further, I am not prepared to forward at this time.

Very truly yours,

Al

Alfred P. Kremer

cc: Roy E. Colicchio, Esq.
44 Exchange Street
Rochester, New York 14614

LETTER, dated 12-7-76 from Roy E. Colicchio, Esq. to Assistant U.S. Attorney Gerald J. Houlihan, Esq.

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December 7, 1976

RECEIVED
ROCHESTER, N.Y.
DEC 10
UNITED STATES ATTORNEY

RECEIVED
DEC 8 1976
ATTORNEY

John K. Adams, Clerk
U.S. Courthouse
Niagara Square
Buffalo, New York 14202

✓Richard J. Arcara
U.S. Attorney
U.S. Courthouse
Buffalo, New York 14202
Attn: Gerald J. Houlihan, Ass't U.S. Atty.

Alfred P. Kremer, Esq.
200 Times Square Bldg.
Rochester, New York 14614

Re: U.S. vs. Gerald Yagy and James Lord
File #: CR-76-131

Gentlemen:

We are in receipt of a notice of trial and jury selection dated November 30, 1976 in the above case which advises us that the case has been set down for jury selection on December 13, 1976.

We, as attorneys for defendant Gerald Yagy hereby advise you that said defendant is not ready for trial for the following reasons:

1) Defendant brought on a pre-trial motion for several items of relief, which motions were argued before Honorable John T. Elfvin several weeks ago, however, the U.S. Attorneys Office has not submitted an answering affidavit, nor has it advised us of the materials that it will furnish this office as part of discovery motion. We have not submitted a reply affidavit because we do not have the U.S. Attorney's answering affidavit and that Judge Elfvin, as a result, has not rendered decision on the motion.

2) Defendant James Lord was recently assigned Attorney Alfred P. Kremer as his defense counsel, and we are not aware what pre-trial discovery proceedings he has undertaken or will undertake.

LETTER, dated 12-7-76 from Roy E. Colicchio, Esq. to Assistant U.S. Attorney Gerald J. Houlihan, Esq.

John K. Adams, Clerk
Page 2
December 7, 1976

Richard J. Arcara, U.S. Atty.
Page 2
December 7, 1976

Alfred P. Kremer, Esq.
Page 2
December 7, 1976

3) We previously notified Ass't U.S. Attorney Houlihan that we are still awaiting his answering affidavit and the package of materials that he advised us that he would be sending and, in addition, that the undersigned will be out of State from December 22, 1976 through January 10, 1977.

Very truly yours,

REC/clm
xc: Mr. Gerald Yagy

LETTER, dated 1-19-77 from Roy E. Colicchio, Esq. to Hon. John Elfvin.

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January 19, 1977

RECEIVED
ROCHESTER, N. Y.
JAN 2
UNITED STATES ATTORNEY

Honorable John Elfvin
U. S. District Court Judge
U. S. Courthouse
Buffalo, New York

Re: U. S. vs. Gerald Yagy

Dear Judge Elfvin:

Reference is made to our telephone conversation of January 18, 1977 regarding picking a jury on January 25, 1977 in the above matter.

After I spoke with you, I discussed this situation with my client and again reviewed my calendar for the balance of January and the first two weeks of February. Mr.Yagy has instructed me that I am not to consent to picking a jury until I have concluded all discovery motions and make a mostion for a severance.

You will receive the severance motion papers shortly. There is still pending pre-trial discovery motions which have not been decided by you. I presently own you a response to the U. S. Attorney's answering affidavit. Youwill receive our response within the next several days.

In addition to my client's position, I am personally committed on a number of other matters including a trial here in Rochester, a meeting with a New York State Tax Commissioner in Albany and I am required to submit two memoranda of law on two separate Social Security Administration cases on or before January 28. In addition, our lawfirm, along with eleven other firms are under a court order to conduct a deposition in a gas explosion case commencing February 1 through February 4, 1977, which deposition lasts from 9:30 a.m. to 4:30 p.m. each day. This is an extensive case moneywise and it usually takes me two or three solid days before the commencement of the deposition to read transcripts from prior depositions in order to prepare for the forthcoming deposition.

LETTER, dated 1-19-77 from Roy E. Colicchio, Esq. to Hon. John Elfvin.

Honorable John Elfvin
Page Two
January 19, 1977

Under the circumstances, I request that we be allowed a further adjournment in selecting a jury and/or commencing trial.

Mr. Kremer has no objection. Mr. Houlihan has no objection as long as this particular delay is chargeable to the defendant as the same relates to the Speedy Trial Act.

Your courtesies and cooperation will be appreciated.

Very truly yours,

ROY E. COLICCHIO

REC/db

cc: Mr. Gerald Houlihan ✓
Asst. U. S. Attorney
U. S. Courthouse
Rochester, New York

Mr. Alfred Kremer
Attorney at Law
200 Times Square Building
Rochester, New York

Mr. Merwin Morehouse, Jr.
10th Floor, Union Trust Building
Rochester, New York

EXCERPTS FROM TRANSCRIPT OF 1-25-77, pp. 34-42.

MR. HOULIHAN: Sorry to be late.

THE COURT: What is the situation before Judge Burke?

MR. HOULIHAN: We have completed picking the jury. I just understood from Mr. Kremer --

THE COURT: What is your situation before Judge Burke, you will go back when?

MR. HOULIHAN: We just picked the jury and adjourned. He wants to know whether I am going to trial in his case. If I am going to trial in this case, Gene Welch will try that case tomorrow morning.

THE COURT: Right away, is he waiting for you?

MR. HOULIHAN: He will take a twenty minute recess.

THE COURT: All right. What has happened here, Mr. Colicchio basically made a plea based upon two things, he moved for a severance based upon the Schwartz statements, and I noted for the record my denial of Mr. Kremer's motion in that same regard, to which Mr. Kremer has taken an exception, and I indicated also on that same basis my denial of Mr. Colicchio's motion for a severance. Basically Mr. Colicchio has been advancing his own involvement in several major matters which are going to keep him occupied through February 4th, when he could be ready to try the case. We have talked of February

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8th. I would assume that would mean similarly February 7th, which is a Monday, he would be ready to try on that day.

MR. KREMER: Not the 7th, the 8th. The 7th I have a day certain in Family Court. This respondent is coming from Buffalo. That matter has to be litigated, although it doesn't range in importance you may feel with this matter, nonetheless it is a question of support, my client hasn't received any, and if I have to reschedule that, I don't know when it will get rescheduled. The 8th I am available.

THE COURT: What is the practice here in Family Court, do you go over there in the morning and get the trial over with or do you not?

MR. KREMER: Yes, your Honor, the gavel bangs down at ten and we would be taking the proof that morning.

THE COURT: How long would it take, the trial?

MR. KREMER: It is going to be the morning and part of the afternoon. It might not go the entire afternoon. I would not like to be in the position of finishing half of the case and then having to come here. I don't know when we could adjourn to. The respondent presently is a resident of Buffalo, New York, and I have had difficulty getting him available.

MR. MOREHOUSE: May it please the Court, February 7th I am facing the motion to dismiss a malpractice case which I have had for years. It is a motion to dismiss for failure to prosecute, and it is the most valuable case I have, so I would urge that the 8th would be the better date.

THE COURT: All right. The only thing is, talking again about availability on the 8th, Mr. Kremer joins Mr. Colicchio in asking for that adjournment, Mr. Morehouse similarly asks for it. Mr. Kremer has his own involvements in some matrimonial matters, and at the end of this week, Thursday and Friday particularly, which would keep him from being here on those days, and all things considered, he would rather have the trial off until the 8th, and Mr. Morehouse, I have been talking with you about some aspects, and he feels he would just a soon have the case off until February the 8th. Mr. Baldwin, on your behalf, has asserted the mandate of the Speedy Trial Act, urging me to make findings under 3161(h)(8) of the Criminal Code that the ends of justice in any such delay would outweigh the best interests of the public and the defendant to a speedy trial. I have declined to make any such findings because I don't see what we are presented with is any such proposition. I certainly couldn't say that the ends of justice are better served or outweighed by bowing to the admittedly busy schedules of the trial attorneys. Mr. Baldwin says, 'All right, the alternative is to go to trial.'

MR. HOULIHAN: First of all, with regard to February 8th, that does happen to be a time when I can try this case. With regard to my consent to the adjournment, obviously we have two defendants in jail. Certainly the primary --

THE COURT: One of them is not in our custody. Hasn't Lord gone back after signing the waiver?

MR. HOULIHAN: Yes, he has. He still is in custody under the state charges.

THE COURT: Mr. Schwartz, of course, was arrested November 22nd, so the ninetieth day, as far as he is concerned, according to my computation would be February 20.

MR. HOULIHAN: Yes. I don't want to be in a position to consent to an adjournment. Obviously, Mr. Colicchio has --

THE COURT: It doesn't matter whether you consent or not.

If you consent, that doesn't help the speedy trial aspect.

MR. HOULIHAN: Well, I guess what my feeling is that if Mr. Colicchio has represented on the record that he is not ready to go to trial with Mr. Yagy, for whatever reason, then --

THE COURT: He is ready except he is unavailable. He has some aspects and details of discovery and particularization which I don't think we would have a great deal of trouble with in dealing with getting ready for trial, so it is really his own business on other matters and the fact he did not know until January 18 when I called him that the case was going to be tried today.

MR. HOULIHAN: Well, may I say that in view of the fact that the Government is ready for trial, and the defense attorneys, for whatever reasons, have requested that it be put over until February 8th, may I ask that the defense attorneys waive any claims they have on behalf of themselves or their clients in connection with the Speedy Trial Act?

MR. COLICCHIO: I have advised the Court that the adjournment from today to February 8th will be accepted by the defendant Yagy as chargeable to him.

I am not waiving any rights he may have for anything prior to that, just that we will accept the chargeable time for the two weeks or whatever it is to February 8th.

THE COURT: Mr. Yagy is in the courtroom. You have been listening to this long dissertation, and you have talked, I am sure, with Mr. Colicchio before this about the situation, and I know he had told me over the telephone, as a matter of fact, that you wanted him to make a written motion for the severance and a written motion for the discovery, so you, yourself, would have some kind contemplation of a possible delay. Do you understand that we have the Speedy Trial Act which gives to a person like yourself a right to have this matter disposed of within a certain maximum period of time after being arrested and indicted and arraigned, and so forth, and your period of time as originally calculated, and I don't hold the Government or myself to it, but my first advice was that today was the day by which your trial had to commence under this act. I think probably there may be some loopholes or apetures in that, but that at least is what came up to me as I first got into the series of cases. You have a right to have your case go to trial today. Your attorney, Mr. Colicchio, is asking me to delay it, he states for the record that you would waive any rights you would have under the Speedy Trial Act to have your case commence today. Do you understand what we are talking about?

MR. YAGY: Yes, I do.

THE COURT: Do you want to talk to Mr. Colicchio? I would like to know your position on it.

MR. MOREHOUSE: May the record show that in Mr. Houlihan's absence the defendant Schwartz offered to accept and share responsibility for the request of delay of trial.

THE COURT: That is true. Mr. Kremer, of course, pointed to the waiver, and so forth, that Lord has signed on or about December 15th, and pointed to an aspect of that which Mr. Kremer said would amount to a general waiver of the Speedy Trial rights.

MR. KREMER: That is correct, your Honor.

MR. YAGY: I have conferred with my attorney, your Honor, and we reserve all our rights up to today. From today on I will accept the chargeable time to me.

THE COURT: Any right you had as of right now under the Speedy Trial Act you would not let go of, if we have a continuance until February 8th, you would waive any right you would have arising out of that further delay?

MR. YAGY: That is correct, your Honor.

THE COURT: All right. Now, Mr. Houlihan, what is your situation on the Speedy Trial Act?

MR. HOULIHAN: My position is that that as of today the Government is ready for trial, the motion for a continuance being made by the defendants is within the Court's discretion.

THE COURT: I am not going to be making any (h)(8) findings.

MR. HOULIHAN: Well --

THE COURT: I do, however, invite your attention to (h)(7). Do you want to look at it?

MR. HOULIHAN: Yes. That is --

THE COURT: I assume the Government wouldn't want to be severing Schwartz from the other defendants for trial?

MR. HOULIHAN: No, I don't want to severe for the reasons stated in my opposition papers to the original motion for severance, and in view of the fact regard to Mr. Yagy under (h)(7), the continuance may be granted to all of them. I presume if that is the way the Court would exercise its discretion, that it is satisfactory.

THE COURT: Mr. Kremer was indicating that he has a couple of aspects of particularization and discovery that he needs still to take up with you, he has had some conferences with you, and needs to have another or so, and somebody indicated that — I think Mr. Morehouse — sometimes it is difficult to get a conference with Mr. Houlihan, obviously he is very busy. Now, Mr. Colicchio has a whole listing of things, and you and I talk just briefly on this, only to the point, Mr. Colicchio, where I said to Mr. Houlihan yesterday "that I hope, Mr. Houlihan, that you will have all of the specifics of this situation at your fingertips today," and he assured me he would. Also I guess he gave me some indication, although we didn't get into it, some of the items were not going to be produced. Anyway, there are these details with Mr. Yagy and Mr. Colicchio that need to be gotten into, and all of this resolved so we don't have anything outstanding, so there could

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YAGY'S MOTION TO DISMISS INDICTMENT.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

Plaintiff

-vs-

JAMES R. LORD, JR., GERHARDT SCHWARTZ
and GERALD J. YAGY,

Defendants

Indictment #
76/131

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

GERALD J. YAGY, being duly sworn, deposes and states that:

1) That deponent is one of the above-named defendants named in Indictment #76/131 and that deponent makes this affidavit in support of a motion to dismiss said indictment, in all counts, against deponent on the grounds that he failed to obtain a speedy trial pursuant to 18 U.S.C., Section 3161-3174 and on the further grounds of undue delay in violation of the 6th amendment of the Federal Constitution and Rule 48(b).

2) Deponent states that the dates regarding the alleged offense on indictment #76/131 are as follows:

4/9/76: Alleged bank robbery;

7/26/76: Deponent voluntarily surrendered to FBI and arraigned before Magistrate Joy;

7/29/76: Deponent indicted under Indictment #76/131;

7/30/76: Deponent arraigned on said Indictment;

9/1/76: Deponent's pre-trial motions served;

9/13/76: Motions return date: Adjourned at request of Assistant U.S. Attorney to 9/27/76;

9/27/76: Motions further adjourned due to Judge Burke's illness and matter rescheduled for argument on 11/8/76; subsequently rescheduled for argument for 10/25/76;

10/25/76: Pre-trial motions argued;

12/23/76: U.S. Attorney served answering affidavit in response to deponent's pre-trial motion;

12/24/76-1/9/77 : Deponent's attorney on vacation;

1/21/77: Deponent's response to U.S. Attorney's answering affidavit and deponent's motion for severance served;

1/25/77: Further argument on pre-trial motions and motions for severance; decision on motion for severance denied; decision on motions to dismiss indictment reserved pending Court's reverse of Grand Jury transcript; trial date set for 2/8/77. Period from 1/25/77 to 2/8/77 chargeable to deponent per consent.

3) The time period from 7/26/76 to 1/25/77 constituted 184 days. Although the U.S. Attorney's office sent notices on various occasions that it was ready for trial, deponent was not able to proceed until completion of motions which, in turn, awaited a three month delay in the U.S. Attorney's office serving answering affidavit to deponent's pre-trial motions.

WHEREFORE, deponent respectfully requests that the above-captioned matter, on all counts, be dismissed, and for such other and further relief as to the Court may seem just and proper.

Gerald J. Yagy

GERALD J. YAGY

Sworn to before me this
8th day of February, 1977.

R E Colicchio

ROY E. COLICCHIO
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 19 78

EXCERPT OF TRANSCRIPT 2-8-77 Denying Yagy's Motion to Dismiss for Lack of Speedy Trial.

MR. KREMER: Or some instruction he can be given not to say anything to the jurors at this time.

THE COURT: I don't know, he is here, he has been out in the hall with the jurors. I think to exclude him at this time would over emphasize in the minds of all the jurors whatever he did say to them. I think it is much better to explore it on the voir dire as tenderly and as carefully as we can, and if we get into an area where I can see that we are going to get in to high prejudice, perhaps we would do something on a sequestered voir dire, but at this juncture I am not going to exclude him.

MR. KREMER: Exception.

MR. MOREHOUSE: Exception.

MR. COLICCHIO: I want to make it a matter of record, I have an affidavit to be submitted to you at this time on behalf of the defendant Yagy. Again, I am doing it as a matter of record, Mr. Yagy submitted himself to the jurisdiction of the FBI, was arraigned before Magistrate Joy on July 26, 1976, at which time he pleaded not guilty to the complaint of Special Agent VanZant. He was indicted July 29th, and he was arraigned in Federal Court. From July 26, 1976 to

January 25, 1977, which was our last appearance in court, a total of one hundred eighty four days has transpired. True, we had motions for discovery, trial motions, et cetera. I want the Court to know we had one hundred eighty four days transpired, three months of that was waiting for answering affidavits or responsive papers from the United States Attorney's Office, and under Rule 48(b), under the Speedy Trial Act, and the Sixth Amendment, we respectfully move that the indictment and all counts against the defendant Yagy be dismissed. I have a supporting affidavit to give you as soon as Mr. Yagy signs it.

THE COURT: I assume that what you have in the affidavit is what you have already said to me and, of course, there are exclusions in the Speedy Trial Act, two or more of which are pertinent, namely, the situation attending Mr. Schwartz is grounds for one exception, and I assume there was some time -- I know there was some time spent on motions and determining motions and, of course, that is permissible up to the thirty day period. But the situation involving Mr. Schwartz, I think, more than

Excerpt of Transcript 2-8-77 Denying Yagy's Motion to Dismiss for Lack of Speedy Trial.

amply takes care of that, as it is provided for in Section 3161(h)(7), so it is denied.

MR. COLICCHIO: Exception.

(Thereupon the conference at the sidebar was terminated.)

CLERK: Juror #53, Genevieve B. Kinard.

MARSHAL: Juror #1.

CLERK: Juror #207, Frances N. Levatino.

MARSHAL: Juror #2.

CLERK: Juror #239, John E. Wickens.

MARSHAL: Juror #3.

CLERK: Juror #179, Dominic J. Catanese.

MARSHAL: Juror #4.

CLERK: Juror #181, Lenora R. Chester.

MARSHAL: Juror #5.

CLERK: Juror #208, Bernadine Liberatore.

MARSHAL: Juror #6.

CLERK: Juror #25, Mrs. Jean E. Doherty.

MARSHAL: Juror #7.

CLERK: Juror #209, Traute A. Mandrino.

MARSHAL: Juror #8.

CLERK: Juror #39, Charles R. Gordon.

MARSHAL: Juror #9.

* * * * * *

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EVERETT J. REA,
Being duly sworn, deposes and says: That he is associated with Spaulding Law Printing Co. of Syracuse, New York, and is over twenty-one years of age.

That at the request of Richard J. Arcara, U.S. Attorney for the Western District of N.Y.

Attorney(s) for Appellee,

(1)
(~~S~~)he personally served three (~~3~~) copies of the printed ☐ Record ☐ Brief ☒ Appendix of the above entitled case addressed to:

WILLIAM J. GALLAGHER
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New York, N.Y. 10007

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ALFRED P. KREMER, ESQ.
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200 Times Square Bldg.
Rochester, New York 14614

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Everett J. Rea
EVERETT J. REA

Sworn to before me this 18th day of August, 1977.

Donald E. Guinn
~~Notary Public~~
Commissioner of Deeds

cc: Richard J. Arcara, Esq.

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